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CONVEYANCER'S NOTEBOOK

Purchase from Son of "Sitting Tenant."—We have received some interesting correspondence arising out of our note on p. 84, *ante*. It is pointed out that a statutory tenant under the Rent Restrictions Acts has no assignable interest. One correspondent writes:—

"In cases where the sitting tenant is a person other than the actual purchaser, as, for example, the father, mother or father-in-law, we insist that the sitting tenant should purchase the property and resell to the actual purchaser at the same price with vacant possession. The conveyance takes the form of a sale and sub-sale and has the advantage that, even in the case of a statutory tenancy, the sitting tenant, having sold with vacant possession, can no longer assert any right to the tenancy."

The situation is far from simple: in *Brown* v. *Draper* [1944] K.B. 309 the Court of Appeal held that the only way in which a statutory tenant could be deprived of the protection of the Rent Restrictions Acts is (a) by his going out of possession, or (b) by his having an order for recovery of possession made against him. This decision has resulted in another correspondent adopting a more elaborate practice. He writes that, as neither of these courses is suitable to meet the type of case under discussion, counsel advises that "the proper course would be for the sitting tenant to purchase the property, then mortgage the same to the building society, and, after a short lapse, sell the property subject to the said mortgage to the son. The tenancy formerly vested in the tenant would merge on the purchase in the freehold of the property."

The disadvantage of this suggestion is the double stamp duty involved and we are inclined to the view that the former practice is effective. As is pointed out, the contract of sub-sale gives the purchaser an enforceable right, not merely to a conveyance, but to a conveyance with vacant possession, and, after conveyance, the former tenant cannot set up his statutory rights.

There is, however, another difficulty that may be present in some cases, arising out of the residence of the wife of the sitting tenant on the property. In our earlier note we expressed the view that the *dicta* in *Errington* v. *Errington* [1952] 1 All E.R. 149 that a mere licence to occupy premises would bind a purchaser with notice, went too far, but since then the Court of Appeal in *Bendall* v. *McWhirter*, noted *post*, p. 236, has affirmed these *dicta*. It may well be, therefore, that the wife of a sitting tenant may seek to set up a licence against a subsequent purchaser, though she could not do so after the sitting tenant's death, as death revokes the licence. It would seem that this difficulty could be overcome by the wife assenting to the sale to the son.

Subletting as a Business.—A correspondent writes:—

"*Barton* v. *Reed* [1932] Ch. 362 is a case which keeps cropping up in practice, although its precise scope and significance seem open to a good deal of doubt.

"It was a case in which there was a covenant by a lessee not 'to suffer the premises to be used for the carrying on thereon of any . . . business. . . .' The premises were in fact underlet in self-contained flats, the tenant of the whole undertaking to supply constant hot water and to clean the common staircase, etc.

"Luxmoore J. (as he then was) said, at p. 373: 'Business of course is a wide and flexible word, but that the subletting of premises in suites or apartments, with or without the provision of any other service, is a business, I think can be open to little doubt.' I think it is generally assumed that this decision governs the construction not only of covenants in leases, but also of restrictive covenants affecting freeholds. It is therefore one of widespread importance.

"In contrast with the passage already quoted, Luxmoore J. said, at p. 374: 'In my judgment the fact that she (the tenant) retains control of an important portion of the premises and is under liability to supply certain services, like the provision of hot water and so on, constitutes the carrying on of a business.' The apparent

contrast between these two passages unfortunately obscures the principle underlying the decision. Was it the mere subletting of the property in self-contained residential units that constituted the carrying on of a business, or was it the rendering of the services?

"Landlords and tenants do not ordinarily intend that clauses in residential leases prohibiting the carrying on of business on the premises should govern the underletting of the premises themselves, either as a whole or piecemeal. The subletting of the whole or of any part of the demised premises is in practice always dealt with in a separate clause, if it is intended to be legislated for at all. The covenant against carrying on trades or businesses is, we suggest, in reality directed against unresidential activities *on* the premises as distinct from dealings *with* the premises. These latter dealings are normally governed (if any restriction at all is desired) by the common form clause—that the tenant shall not assign, sublet or part with the possession of the demised premises *or any part thereof*.

"Notwithstanding these considerations, the first of the two passages quoted above does seem to make it clear that the gravamen of the complaint against the tenant was the mere subletting in residential units. Furthermore the services described, being no more than quite normal incidents of subletting in modern conditions, could hardly have been regarded as a separate business on their own account (as for example, catering might be).

"If one assumes (as apparently one must) that the mere letting in parts of buildings can amount to the carrying on of a trade or business within the meaning of such a covenant, it seems difficult to avoid some rather surprising and possibly inconvenient conclusions and some awkward problems. Here, it is suggested, are a few of them:—

"(a) If a person (1) makes a business of letting or dealing in residential property, and (2) lets or sublets a particular house or flat in the course of his occupation, then that person must, it seems, be using that house or flat 'for the carrying on of a business' in breach of the covenant. Such a conclusion might, it is thought, be inconvenient for quite a number of property-owners and property-owning companies. A further odd result would be that the answer to the question 'Breach or no breach?' would depend not only upon what the tenant or owner did on the property which was affected by the covenant, but also on what he did elsewhere. If, for example, he owned only one house or flat, he could let it with impunity, whereas if he owned two or three (all subject to a similar covenant) he could not let any of them.

"It seems quite illogical for this purpose to differentiate between

the subletting of residential units in one building or block of buildings and the subletting of more dispersed units.

" (b) What would be the situation of a man who owned and let (say) three flats in a block of 20, as compared with the tenant or owner of the entire block?

"(c) Even assuming that some logical basis for differentiation could be found between an owner of a block of contiguous residences on the one hand and an owner of several dispersed residences on the other hand, is a further distinction to be drawn between the owner of a block of self-contained flats and the owner of a terrace of houses? If, for example, each house in such a terrace (as is not uncommon) were subject to a restrictive covenant of the kind under consideration, it seems difficult to avoid the conclusion that the owner could not let any of them without committing a breach of covenant. After all, the only real distinction between a terrace of houses and a block of flats is that between vertical divisions and horizontal divisions. Common private approaches and combined drainage systems and some common services are not confined to blocks of flats.

" Admittedly, it seems odd to describe adjoining houses as ' apartments or suites of rooms,' but is it not equally odd in modern conditions so to describe separate self-contained flats?

" (d) If the owner of a building, having divided it into two self-contained flats, lets one and occupies the other, does he commit a breach of the covenant or is he guiltless until he lets both?

" (e) What is the situation where such a covenant is inserted in a conveyance or lease of property already converted into flats?

" (f) Is the covenant to be construed differently if the lease containing it also contains the usual covenant ' not to assign, underlet or part with possession of the demised premises *or any part thereof* without consent '? On the one hand, it is artificial and inconvenient to hold that the parties intended the two covenants to overlap; on the other hand, a covenant restricting assignment or underletting is in practice never omitted unless the parties intend that the tenant shall have a free hand. Since no such covenant against assigning or subletting ever occurs in restrictive covenants affecting freeholds, is the word ' business ' when applied to freeholds to be given a wider meaning than when applied to leases? "

The point raised by our correspondent is an interesting one. The difficulty has only arisen because premises may be " used as a business " in two quite different senses. They may be so used because some kind of business is conducted on the premises, *e.g.*, a business office, a school or shop. Or they may be so used in that

the owner or tenant makes a business out of subletting them or taking in lodgers.

In those parts of our law which are based on the public interest there is a clear tendency to treat premises as residential and not business premises where they are used for residence or dwelling, whether or not anyone is making a business out of them. Thus the emergency legislation prohibiting conversion of residential property into business premises would not hit at converting a house into flats, which provides more, rather than less, housing accommodation. The Rent Restrictions Acts protect tenants even though they take in lodgers or sublet part of the premises, and do not shut them out as occupying "business premises" (*Ebner* v. *Lascelles* [1928] 2 K.B. 486). The same applies if the tenant runs a boarding-house (*Vickery* v. *Martin* [1944] K.B. 679, at p. 681; *Luttrell* v. *Addicott* [1946] 2 All E.R. 625 (C.A.)), or an hotel, provided the tenant normally lives in the hotel (*Kitchen's Trustees* v. *Madders* [1950] Ch. 134, 148, 150).

Under the Town and Country Planning Act, 1947, s. 12 (3), the use as two or more separate dwelling-houses of a building previously used as a single dwelling-house is treated as a material change of user (and *cf.* [1949] J.P.L. 446), but this Act strikes at all types of change of user.

When we come to ordinary private law the shoe is on the other foot. We are here concerned with preservation of amenities and land values, not with the actual physical user of premises. A tenement is more of a nuisance to neighbouring exclusive property than a single dwelling, even though the tenement is used for purely residential purposes. Hence the law appears quite clear that almost every type of exploitation of property by taking in lodgers or subletting may be construed as a breach of covenant against carrying on business. The taking in of lodgers has been held to be a business in this sense in *Thorn* v. *Madden* [1925] Ch. 847, followed in *Tendler* v. *Sproule* [1947] 1 All E.R. 193 (C.A.). It is also a breach of a covenant against using premises solely as a private residence. The same applies, as was held in *Barton* v. *Reed* [1932] Ch. 362, to subletting a number of service flats. How far this depends on the number of flats and the terms of subletting cannot be definitely answered. Woodfall (24th ed., 600) and Foa (7th ed., 234) treat the decision as limited to service flats. Halsbury (2nd ed., Vol 20, 228 (g), 230) treats it as applying to all letting in flats. Whether a subletting of one of two floors of a house constitutes use of the house as a business seems questionable, but it would be temerity to suggest a reliable test of distinction.

One point raised by our correspondent is easier to answer. It

seems to us unlikely that activities of the covenantor carried on elsewhere could ever be material. The covenantee is not interested in the number of subleases made by the covenantor; he is simply interested in the preservation of the house and its amenities and those of other houses near enough to be prejudiced by sublettings and conversions. Hence it is immaterial that the tenant makes a business of letting property in various places. All that matters is whether the tenant is using the particular house as a residence or as a business. The "overlapping" of covenants against underletting and against using premises for a business must be common. But our correspondent has pointed out that the business covenant may well be included in a conveyance of freehold, in which case any covenant against underletting or assigning would be void. *Barton* v. *Reed* (*supra*) appears to apply to such cases as well. In *Rogers* v. *Hosegood* [1900] 2 Ch. 388 (C.A.), at 409, Collins L.J., who read the judgment of the Court of Appeal, stated that, under the particular deed before the court, a conversion into residential flats, with a common entrance and staircases, would be a breach of a covenant to use for private residence. And Preston and Newsom on *Restrictive Covenants* (1939), p. 75, treat *Barton* v. *Reed* as a general authority in cases of covenants on the sale of freeholds. They do, however, attach some importance to the control of stairs and halls and the provision of services. It is interesting that, as was emphasised in *Barton* v. *Reed* itself, section 17 (3) of the Landlord and Tenant Act, 1927, expressly excepts from the definition of a business, for the purpose of that Act, "the business of subletting the premises as residential flats, whether or not the provision of meals or any other service for the occupants of the flats is undertaken by the tenants," which rather assumes that apart from the section all such activities would be described as a business.

Our correspondent might have mentioned a further case in which the business covenant does not overlap with the covenant against underletting. The Landlord and Tenant Act, 1927, s. 19 (1), prevents the lessor, in the case of a long building lease, stipulating that the leases shall not assign or underlet the premises, except during the last seven years of the lease. A long lease, for this purpose, is one for more than 40 years. It is notable that the lease in *Barton* v. *Reed* was granted in 1865 and was not to expire until 1943, so that it had more than seven years to run when the dispute arose. The report does not refer to any covenant against underletting and no doubt no such covenant had been put in the lease. Hence the lessor was compelled to rely exclusively on the condition against carrying on a business. It was hardly argued that the tenant in *Barton* v. *Reed* was not carrying on a business though it

was strenuously argued that a landlady might reside off the premises and sublet it in parts without carrying on any business on the premises or using those premises for business. It is only in connection with long building leases that the problem is likely to arise. The usual covenants against underletting all or part of the premises will be more useful in other cases.

A. K. R. K.

Stamp Duty on Conveyances. In the last issue, *ante*, p. 81, we drew attention to the reduction in stamp duty on conveyances up to £3,450 proposed by the current Finance Bill. An amendment has been proposed, and accepted by the Government, that the reduction shall come into force on the passing of the Act instead of August, 1952.

THE LAND REGISTRATION ACT, 1925 AFTER TWENTY-FIVE YEARS

By G. Boughen Graham, ll.b., Barrister-at-Law

(*Continued from p.* 97, *ante*)

Boundaries and Descriptions

The Land Registry Act, 1862, which first attempted to introduce land registration to this country required not only that all boundaries should be described with meticulous accuracy but also that their correctness should be verified by serving notice upon all adjoining owners and hearing their resultant objections. In later Acts this expensive and luxurious procedure was abandoned although it is still possible to register land with " fixed boundaries." To do so it is necessary, however, under rule 276 to serve notices as under the Act of 1862 and to resolve all disputes that might thereby be brought to light and in practice fixed boundaries are never met with.

It is provided by rule 272 that the Ordnance Map shall be the basis of all registered descriptions of land and whilst by rule 281 a verbal description may be entered upon the Register such particulars must be approved by the Registrar and in practice such descriptions are not encouraged. By rule 278 it is provided that the filed plan or General Map shall be deemed to indicate the general boundaries only so that the exact line of the boundary will be left indeterminate—as, for instance, whether it includes a hedge or wall and ditch or runs along the centre of a wall or fence or its inner or outer face or how far it runs within or beyond it or whether the land registered includes any portion of an adjoining road or stream. It appears to be very rare for either the property register or the filed plan to give the actual area of the property comprised in the land certificate although the Chief Land Registrar at the recent inquiry stated that the area was indicated if there were no physical boundaries. When mentioning the absence of physical boundaries it may also be noted that counsel for the Crown stated that it was not the practice of the Registry to insist upon the requirement set out in Land Registry Form 1E that:—

> " Registrations cannot be effected unless and until the land has been officially surveyed and such fences, wall and boundary posts 4 to 5 feet high, or other physical features found as will

enable the Registry officials to identify it on the ordnance survey map. Pegs are not sufficient to define boundaries."

It would appear that this policy of not insisting upon the erection of substantial boundary posts is a new one, as it was stated in evidence that such erection had been insisted on in the summer of 1951.

Now it may well be that the present practice of the Registry is admirable where the property sold comprises a nice neat suburban villa standing upon a nice neat square of ground—indeed, one sometimes gathers the idea that the whole system of registration is designed with that sort of property in mind and that it would work admirably if it were not called upon to deal with any other. It is now the case, however, that compulsory registration is to spread into rural areas and there it is often the case that the parties attach very considerable importance to the description of the land sold and to a proper and accurate description of the boundaries thereto. On a well-drawn conveyance of agricultural land it is usual to find that the exact area of each field and its state of cultivation is set out in the conveyance and the boundaries are defined to show whether, for instance, a parcel of land extends to the ditch on the far side of the hedge. Furthermore, the ownership of boundary fences is frequently indicated by T-marks. Each of these characteristics may be examined in turn; each is there for a reason.

It is convenient to have the state of cultivation set out for many reasons which it is not necessary to labour. A perfectly sufficient example is to be found in the provisions in the Agricultural Holdings Act, 1948, as to compensation for laying down pasture. It is not known whether, if a schedule of the areas and states of cultivation of fields were submitted under rule 281 (1), it would be approved as a matter of course but it is suggested that it should be so.

The position taken up by the Registry as to the precise definition of boundaries is, briefly, that unless they have been agreed with adjoining owners they are valueless. It is submitted that this is not so. There are two reasons why it is not so and one is to be found in the case of *Fisher* v. *Winch* [1939] 1 K.B. 666. Where two estates are separated by a hedge and a ditch there is a presumption, in the absence of evidence, that both hedge and ditch belong to the owner of the land upon which the hedge is planted; the presumption seems to be based upon the fact that when a man cuts a ditch he does so at the extremity of his own land and throws the spoil on to his own land in order that he may plant a hedge on

top of it. (See Lawrence J. in *Voules* v. *Miller*, 3 Taunt. 137.) What *Fisher* v. *Winch*, *supra*, decided was that the presumption is ousted where the parties convey by reference to an ordnance survey map so that the boundary can be ascertained from that map. Hence it appears that the effect of registration and description by reference to the map may well serve to oust the presumption and hence change the boundary to what any countryman would know to be an unnatural position.

The other reason is that, whilst it may be true that if neighbours are each claiming a disputed strip of land the precise description of the boundaries upon the conveyance of one of them will not necessarily be conclusive, it is often found not that there is a fierce contest but only that the parties do not know their rights and want them settled one way or the other. In those circumstances, in the case of unregistered land, precise boundaries are of great assistance and are almost conclusive if the abstracts of the respective properties should show, as may often be the case, that they were once in one hand.

Similar considerations apply to T-marks. The practice of the Registry is to omit them unless they are referred to in covenants which manage to get themselves on the Register; it is said that they are not conclusive against anyone if there is a dispute. That may be so, but when it is desired to ascertain the exact position of a boundary which is not hotly disputed but only unknown it is valuable to look at the T-marks as disclosed in each title. If it should be found that they are in opposition one is no further forward but if, as is most likely, they are in unison—*caedet questio.*

The real point, apart from the *Fisher* v. *Winch* considerations, which applies to both descriptions of boundaries and T-marks, is that in unregistered conveyancing they are there and are often of great value although admittedly not always conclusive. In registered conveyancing they are "lost and gone forever"—unless, indeed, the purchaser keeps a sort of duplicate unregistered title in addition to his land certificate.

In unregistered conveyancing the vendor and the purchaser, on the advice of their respective solicitors, decide, if necessary by negotiation, what degree of particularity of description they require. In registered conveyancing it is decided for them. There does not seem to be any insuperable difficulty in devising some system whereby the parties have some say in deciding what should be put on the Register and whereby the Register would indicate boundaries and T-marks with some particularity without their being technically "fixed." Such a system would be an advantage even if, as seems reasonable, their accuracy was not "State-guaranteed."

Easements and Profits

Anyone having the slightest experience of conveyancing, especially in rural areas, is well aware, not only of the practical importance of easements, but also of their infinite variety and complexity. Rights of way, water and drainage in particular are met with on every hand and it is obvious that if disputes are to be forestalled their exact nature and extent must be defined with some particularity. A right of way is usually defined by reference to a fairly large scale plan and its extent is invariably to be found in the deeds—for example, a right of way on foot or with bicycles in connection with the use of the premises conveyed as a private residence. Rights of drainage and of taking water are often most involved and are only explicable after reference to highly detailed plans prepared for the purpose by a surveyor when the easements are created. In each case the plan forms part of the conveyance and upon a sale of the land the conveyance and plan will go with the deeds unless, indeed, some land is retained by the vendor. If that is the case it will often be found that a tracing of the plan will be taken and incorporated into the new conveyance.

The important thing is that these plans are prepared for a purpose and because experience shows them to be necessary: furthermore the degree of elaboration may be varied as the circumstances demand and in any particular case is decided by agreement between the parties. Finally this particularity will usually extend to both dominant and servient owners: the one will know what he has purchased with his land and the other will know to what his land is subject. Either will have an action upon the covenants for title if he does not get what he is entitled to.

Consider now the corresponding practice in the case of registered land taking the dominant and the servient tenements separately.

The Dominant Tenement

By rule 254, if the Registrar is satisfied that the right in question is capable of subsisting as a legal estate and is appurtenant to the land he may enter it as part of the description of the land in the property register and by rule 255 it is provided that the entry shall be made as far as practicable by reference to the instrument (if any) creating the right or by setting out an extract therefrom. This is reasonably satisfactory so far as it goes except for this: if the first alternative is adopted and the easement is recorded by reference and not by extract one would expect to hear no more of the notorious claim which was made in para. 39 of a pamphlet "Land Registration and State Title," issued by the Land Registry

in 1926. It was there stated that "It is only necessary to read the Land Certificate."

Since this matter of easements is of such importance it is well to examine what happens in practice. A transfer of a dwelling-house was submitted for registration: the transfer was expressed to be with the benefit of:

> "(i) A right of way for all purposes in connection with the use of the premises hereby transferred as a private residence over and along the road known as . . .
>
> "(ii) A right of free passage and running of water and soil through the sewers etc. in through and under the adjoining lands of the said . . . and used in common with the land hereby transferred"

and there was a reservation of rights of drainage and so forth through the land transferred.

In fact the title as registered contained no mention at all of either of the appurtenant easements. The right of way was omitted because it was the practice of the Registrar to omit references which were obvious: the right of drainage because it was too vague since the nature and extent of the servient tenement was not specified. The first comment upon the first reason might well be that there seems little point in two solicitors, acting for the parties, agreeing the terms of the transfer if some unknown and unqualified person in the Registry is going to ignore them because he thinks that the easement is unimportant. The second comment is that the easement as granted was restricted to use of the premises as a private house: suppose it became used as a school—is it "obvious" that the right of way is no longer valid? As to the second matter it is submitted that a court would have had very little difficulty, if the effect of the reservation had been litigated, in finding what was the servient tenement and therefore the reservation is far from valueless.

Indeed, it is impossible to say that a Land Certificate is just as good as an abstract of title unless and until it is the practice of the Registrar to record thereon any easement which is appurtenant to the land accompanied by such plans as are required to make it intelligible. If it appears to the Registrar that an easement is expressed in such terms as to make it valueless yet it should be recorded—it is for a court of construction, not the Registrar, to say if it means anything and, if so, what.

Independent Registration

Before leaving the registration of easements viewed from the standpoint of the dominant tenement it might be mentioned that rule 50 envisages the separate registration of manors, advowsons,

rents, tithe rentcharges (now tithe redemption annuities) or other incorporeal hereditaments. An easement is incontestably an incorporeal hereditament and so *prima facie* might be registered upon its own account and not as part of the property to which it is appurtenant. Dr. Potter in his valuable book "Principles of Land Law under the Land Registration Act, 1925" (2nd ed., p. 45) thought that rule 52 impliedly excludes the registration of anything other than a rent, tithe or tithe rentcharge and that the expression "or other incorporeal hereditaments" must be construed *ejusdem generis* as the preceding examples. One differs from Dr. Potter only with great reluctance but it does seem that this argument is not entirely convincing. In so far as it is based upon the absence of any provisions in rule 52 which would apply to an easement one may remark that there is similarly no provision as to advowsons which are expressly within rule 50. In so far as it is based upon the *ejusdem generis* argument one wonders what characteristic manors, advowsons, rents and tithe rentcharges possess in common which is not possessed by an easement. After all, there must be a genus for the *ejusdem generis* rule to apply.

In the case of an easement, which cannot exist in gross, the matter is perhaps of little practical importance because it is impossible to imagine anything more practically inconvenient than the registration of an easement separately from the land to which it is appurtenant. The matter is not so simple in the case of profits, which can exist in gross, and it is not easy to reconcile all the provisions of the Act and Rules. Consider the case of a grant of a perpetual right of fishing in a river: it was held as long ago as 1495 (Y.B. 11 Hen. 7, f. 86) that this was a valid legal interest. By section 2 an estate in land capable of subsisting as a legal interest may be registered, and by section 3 (viii) land includes "other incorporeal hereditaments." So far our freehold profit in gross is registrable although it will never be compulsorily registrable (proviso to section 120 (1)) and this is confirmed by rule 50 quoted above: but rule 257 made in pursuance of section 144 (1) (xx) provides that the benefit of an easement, right or privilege shall not be entered on the Register except as appurtenant to a registered estate.

The result appears to be that unless rule 50 can be restricted as suggested by Dr. Potter an appurtenant right may be separately registered but one which is enjoyed in gross may not—a result which seems a little strange. The difficulty is even more pronounced in the case of advowsons. These are expressly registrable under rule 50 but, if rule 257 applies to them, they are only registrable if they are appurtenant to a registered estate and not if they

are in gross. It is not proposed here to discuss whether an advowson is a privilege or a duty, but it cannot be denied that it is a right. Hence, the only advowsons which are registrable are advowsons which are appurtenant to a registered estate: the beauty of that proposition is enhanced when it is recalled that advowsons which are not in gross are appendant, not appurtenant.

The Servient Tenement

So far as the servient tenement is concerned easements are overriding interests and outside the scheme of the Act. A transferee of a registered title takes expressly subject to any such interests and therefore, if he finds that an apparently unincumbered property is subject to easements so as to halve its value, there can be no question of indemnity.

Nevertheless section 70 (2) provides:—

> "Where, at the time of first registration any easement, etc., created by an instrument and appearing on the title adversely affects the land the Registrar shall enter a note thereof on the Register."

Unfortunately that is not all: rule 41 provides the notice shall only be entered if the Registrar thinks fit and shall be entered, if at all, either by reference or by extract. Rule 199 provides that the Registrar shall not be required to enter notice of any matter which appears to him to be of a trivial or obvious character.

The net result of those provisions in the case quoted above was a notice to the effect that:—

> "The land is subject to rights of drainage through the sewers etc. therein or thereunder"

there was no reference to the document creating those rights and there was no means of finding who was the owner of those rights.

Furthermore, at the recent inquiry, the Chief Land Registrar admitted that that was a fair example of the manner in which adverse easements are noted either on first registration or, as was actually the case here, on creation.

It was very fairly admitted by the Chief Land Registrar that both easements and restrictive covenants were unfortunate from the point of view of the Registry and that they wanted to make as little of them as possible; hence they referred to them in a manner which gave as little trouble as possible. Now this may or may not be all right in practice so long as the Registrar is dealing with the suburban villa type of property. But it is strongly suggested that if that attitude is persisted in in dealing with rural property a great deal of difficulty and danger is going to ensue.

The real dilemma which faces the Registrar is this. If he sets out to make his Land Certificate as useful and informative as an abstract of title (even a post 1925 abstract of half a dozen pages) then he has either to enter lengthy extracts from deeds upon the charges register or bind up copies of the deeds with the Land Certificate: in either case he may have to reproduce fairly extensive plans and diagrams. If he does this the Land Certificate becomes exactly equivalent to an abstract and the claim of simplicity is gone. The present policy, therefore, is to preserve simplicity at all costs by abridging or omitting matters which ought to be included in full. There is a third course which is to proceed as far as possible by reference to other deeds, but this seems to be, if anything, more objectionable than the first.

So far as the writer can see, however, there is only one course properly open: the registered title should and must be made as informative as the unregistered. If when this is done it is found that it is no longer any simpler, that is nothing more than is to be expected.

Restrictive Covenants

The difficulties encountered in the registered system over restrictive covenants are in many ways similar to those which are found in the matter of easements. Restrictive covenants may be created under section 40 or noted under section 50 and by rule 212 they shall be entered in the charges register as directed by section 50. Section 50 provides:—

> "The notice shall be by reference to the instrument, if any, which contains the covenant or agreement and a copy or abstract of such agreement shall be filed in the Registry."

There is, of course, this difference between the two cases. If an easement is not in fact noted against the servient tenement a transferee of that tenement nevertheless takes subject to it because it is an overriding interest: if a restrictive covenant is not noted against the land which is burdened with it a transferee would, under section 20 (1), take free of it. Thus there can be no question of the Registrar simplifying the Register by omitting restrictive covenants which do not seem to be important.

So long as the covenants are set out in full the Land Certificate is, in fact, as valuable as an abstract of title, subject only to two observations to be made below. If, of course, they are recorded by reference then a purchaser of registered land can only put himself into the same position as a purchaser of unregistered land by obtaining an official copy of the deed imposing the covenants. If the land

had not been registered the deed would have been abstracted and in his possession in any event. Again so much for the claim that "it is only necessary to look at the Land Certificate." In fact this question has engaged the attention of the Registrar, and in his report for 1950–51 it is stated that:—

> "It has been possible to continue without interruption the practice of setting out restrictive covenants in full on the Register when the entry does not exceed a page of the Register in length."

It is suggested that if the registered system is to compare with the unregistered, all restrictive covenants should be set out at length whether or not they fit into a page of the Register.

Even if, however, covenants are set out in full another difficulty remains in the case of registered land. Suppose A to convey to B, B entering into a restrictive covenant. B conveys to C who agrees to sell to D. In a normal contract of sale there will be a condition (see, for example, Condition 27 of the Law Society's Conditions of Sale) that D must indemnify C against any future liability under the covenant if, but only if, C will remain liable after the transfer has been completed. Whether he will remain so liable will depend upon whether or not, when C purchased, he entered into an express covenant to indemnify B. In the case of unregistered land it is only necessary to look at the abstract to ascertain the true position. If the land is registered it will be necessary to apply under rule 290 for permission to inspect the transfer from B to C. Such inspection is at the discretion of the Registrar, although, of course, there is no question that it would be allowed in a proper case. Nevertheless, it is necessary to ask for it and then either to attend at the Registry to inspect the transfer and take a note of it (in pencil, not ink—see rule 291) or to requisition an office copy of it under rule 296 and to pay the fee therefor.

This is, of course, overcome to the extent that the Registrar binds up copies of the transfers with the Land Certificate, and it appears that this is often done where the transfer contains restrictive covenants. One does not complain of that practice, indeed one unreservedly welcomes it: but if the Land Certificate is going to be in effect a bound-up abstract where are the advantages of registration?

THE AGRICULTURE ACT, 1947

Section 86 of this Act has now been in the Statute-book for some five years but is not yet in operation. Nevertheless, one supposes that sooner or later it will come into operation. It appears that when it does a purchaser of registered land may be at some small

disadvantage compared with a purchaser of similar unregistered land.

The object of the section is to prevent undesirable splitting-up of farming units and it is provided that where a part of a farm is sold off then, at any time within three years of the sale, the Minister of Agriculture may serve a compulsory purchase order upon the purchaser. Now if the land is unregistered an intending purchaser will be able to see from the abstract that the land he is purchasing has formed part of a larger parcel of agricultural land, and if it has so formed part within three years of his purchase or intending purchase he will be aware of the risk of a compulsory purchase order.

If, however, a piece of land, hitherto unregistered, is sold in a compulsory area, that piece will forthwith be registered. If it is then resold within three years there will be no indication available to a purchaser that it ever formed part of a larger parcel; hence he will have no knowledge of the danger of an order. The point is doubtless a small one, but it is another case where the advantage seems to lie with the older system.

Positive Covenants

Very frequently, upon the sale of land a positive covenant, for example, to maintain a fence, is taken. Such a covenant does not run with the land but it is usually made to do so in effect by a chain of indemnity covenants. Thus if V enters into a positive covenant with P he will usually do so on behalf of himself and his successors, owners for the time being of property retained by him; when he sells that property to A he will sell subject to the covenant with P and will obtain an indemnity from A. If A then sells to B and the land is unregistered the conveyance from V to A will be abstracted and the existence of V's covenant with P and of A's indemnity to V will be at once apparent to A's solicitors, who will stipulate for an indemnity from B.

If the land is registered it will usually be found that there will be no mention of positive covenants and the transfer from V to A, instead of being apparent will, unless it has been bound up with the Land Certificate, be secreted in the Registry. Doubtless it may be possible to inspect it under rule 90, but whether that is so or not the registered system does not contemplate a routine examination of earlier transfers. The result is that unless A's solicitor acted for him when he bought the land and is blessed with a phenomenal memory he will not know of the existence of the covenant and so will fail to take an indemnity. The result of such failure is to be seen in *Cator* v. *Newton* [1940] 1 K.B. 415, although in that case

no blame could be attached to the Registry since it was one of the occasions upon which a positive covenant was recorded.

In fact, at the recent inquiry, the Chief Land Registrar stated that at one time it had been the practice to record positive covenants by sewing up a copy of the transfer with the Land Certificate, but that that practice had been discontinued. As a result of the evidence which had been offered he was considering the desirability of re-introducing the practice. Assuming that this is done the fact remains that to be perfectly secure a solicitor acting for a vendor, if there is any possibility of the existence of positive covenants, ought to apply under rule 90 for permission to inspect any transfers which took effect during the period when it was not the practice to record positive covenants in order that he may consider whether he should call for any indemnity covenant from the prospective purchaser.

COVENANTS FOR TITLE

It should not be thought that the vendor's covenants for title are of no importance in registered conveyancing. If it were that the "State-guaranteed title" could be made perfectly watertight in every respect then, of course, they could be ignored by a registered proprietor. There must, unfortunately, always be overriding interests, and therefore there must always be circumstances in which the State guarantee proves a broken reed (*e.g.*, *Re Chowood*, *supra*). In these circumstances these covenants become of value and it may be that difficulty will be found in tracing them.

If, of course, transfers have been for some other reason bound up in the Land Certificate the covenants for title will be plain. If this has not been done but the proprietorship register discloses the successive owners it will be comparatively simple to obtain a sight of the successive transfers under rule 90. Difficulty will, however, be experienced in two cases; in one it is more apparent than real. Where the Register has been "tidied-up" by dropping old entries it will not be possible to follow through the different transfers from the Register of the Land Certificate, but it seems that it is still possible to trace each transfer within the Registry, and no doubt the requisite search will be made in a proper case. The other case which will present very great difficulty is where it is desired to trace the covenants for title upon conveyances before the land was registered. Where the registered proprietor has maintained a duplicate title all will be well, but where he has taken registration seriously and lost or destroyed his old deeds there seems no very obvious means of tracing the required information. It is not suggested that the need arises other than rarely, but attention is drawn

to the matter for what it is worth. It may be mentioned that deeds prior to first registration should not be destroyed, at any rate for some years.

Town and Country Planning Matters

It is well known that there are differences of opinion among conveyancers about the effects of the Town and Country Planning Act, 1947. Not all will go as far as the late Dr. Potter in regarding use as a matter of title. Nevertheless it is difficult to believe that there is anyone who is prepared to assert that the Act has had no effect at all and may be disregarded on the sale of land. The Land Registry cannot in fairness be said to take this attitude although at first sight it would appear that it did. Its attitude is rather that registration is concerned with title and nothing but title (the easy part of conveyancing) and therefore it is not concerned. That may be a defensible attitude in theory, but we may examine the relative merits of the two systems in practice.

Where, on a sale of unregistered land, it is decided that it is essential or at least desirable to include a recital of user on July 1, 1948, and a statement of user at the date of the conveyance, that recital and statement are put into the conveyance and are henceforth abstracted. Hence both are firmly embedded in the title deeds and a prospective purchaser can be satisfied as to the purposes to which the land may be put. If the land is registered there does not seem to be any manner at all in which either matter can be got into the Land Certificate and the result is that it is necessary to prepare a statutory declaration as to the user upon the relevant dates and to put it with the Land Certificate in the hope that the two may not become separated.

Nor is this the only difficulty. It is common (and it will continue to be common until the famous £300,000,000 is disgorged, which may be 1953 or may not) to sell land together with an assignment of the vendor's claim upon that fund. The assignment is incorporated in the conveyance, and it is in the hands of the purchaser who may produce it, as may be necessary, to the Central Land Board. If the land is registered no mention of the assignment appears on the Land Certificate and the transfer disappears into the maw of the Registry. True, it, or an office copy of it, may be got out again under rules 90 and 296 and the Registrar would undoubtedly permit production in those circumstances, but expense and inconvenience are involved. The practical result is, of course, that the assignment is made the subject of a separate document usually involving extra stamp duty.

Suppose unregistered land to be sold in 1949 and 1950, in each case with an assignment of compensation and in each case with a statement of user at the date of the conveyance. The purchaser would have two conveyances to record those transactions. If the land were registered the purchaser would have one Land Certificate, two assignments and two statutory declarations, a total of five. Two of them will cease to be of any value when the compensation is paid out, but he will still be left with three.

There does not seem any insuperable objection to noting the state of user at the relevant dates upon the property register, nor to regarding the claim to compensation as, in practice, " savouring of the realty," sufficiently to be included in that Register. These, surely, are alterations in the registered system which would improve it without materially increasing its complexity.

LEASES

The treatment of leases in registered conveyancing is one of the major puzzles provided by the Act. It is simple enough to set out what must, what may and what may not be registered but it is (at least to the writer) very difficult to see any coherent system underlying the differentiation.

In a compulsory area a grant of a lease for 40 years or more or the assignment of a term having 40 years at least to run must be registered or the grant will be void as a transfer of the legal estate: see section 123 (1). On the other hand, a lease for less than 21 years cannot be registered as such at all (section 8 (3)), nor can a lease, however long or however short, which contains an absolute covenant against assignment (section 8 (2)). It appears, therefore, that a term of between 21 and 40 years may be registered but need not be.

Before examining the effect of these provisions it may be noted that by section 70 overriding interests include:—

" (g) The rights of every person in actual occupation of the land or in receipt of the rent and profits thereof save where inquiry is made of such person and the rights are not disclosed;

" (k) Leases for any term or interest not exceeding twenty-one years, granted at a rent without taking a fine "

and by section 48 a lease which is an overriding interest may not be noted as an incumbrance.

So-called Non-assignable Leases

Consider first the lease with an absolute covenant against assignment. These became very fashionable after the appearance

of the Landlord and Tenant Act, 1927, s. 19, and will presumably become less fashionable if the recommendations of the Leasehold Committee Final Report (1950 Cmd. 7982) para. 311 are adopted. No matter, however, with what motive these tenancies are created, the fact remains that they are in fact assignable if the lessor is prepared to license a breach of covenant. It is difficult to understand why they should be denied registration, but the fact remains that they are and their position should be examined.

If the lease is for less than 21 years and is granted at a rent without taking a fine and is in existence at the time of the first registration of the reversion, then it is surely an overriding interest under section 70 (1) (k). Dr. Kiralfy (*ante*, p. 40) considers that if the lessee was in possession it might be an overriding interest under section 70 (1) (g) but does not mention subsection (k). If the non-assignable term was for more than 21 years or if a fine was taken when it was granted, then section 70 (1) (k) would be excluded, and the lessee would have to fall back on (g). (Parenthetically, why should a lease cease to be an overriding interest because a fine is taken?) Now it is probable that section 70 (1) (g) ought to be in some way restricted in its operation, or, as Dr. Kiralfy says (*ante*, p. 40), it would protect a purchaser of registered land who failed to have his name entered upon the Register and thus make nonsense of the whole system. Dr. Potter (*ubi supra*, p. 41) tentatively suggested that "No disposition requiring registration can be rendered effective without registration by permitting the grantee to go into possession." This, with respect, seems a most reasonable suggestion, but it does not seem to have any application here. By section 8 (2) a non-assignable lease, far from requiring registration, is not permitted to be registered, so it would appear that upon first registration of the reversion a non-assignable lease for less than 21 years and not at a fine is an overriding interest under section 70 (1) (k). Any other sort of non-assignable lease is probably an overriding interest under section 70 (1) (g) if, as is usually the case, the lessee is in possession.

So much for non-assignable leases existing on first registration: what of those created by a registered proprietor? He has power to create such a lease under section 18 (1) (e) and such a creation should be completed by registration under section 19 (2) unless it falls within one of the exceptions to that subsection. It may be that it will fall within section 19 (2) (a):—

> "Provided that nothing in this subsection shall authorise the registration of a lease granted for a term not exceeding 21 years or require the entry of a notice of such a lease if it is granted at a rent without taking a fine"

and, if this is the case, it will be an overriding interest within section 70 (1) (k) and notice will not be required for its protection although it may be noted at the discretion of the Registrar under section 70 (3). Suppose that it is for 22 years, or suppose that a fine be taken: in that case it does not fall within the proviso to section 19 (2) and hence should be noted. But is it not an overriding interest under section 70 (1) (g)? It seems clear that the draftsman did not foresee the wide implications of section 70 (1) (g), but it is submitted that section 70 (1) (g) must apply to leases of this sort which are over 21 years or which are taken at a fine because otherwise they would be stultified upon registration of the reversion.

Leases of 21 to 40 years

The next feature of the treatment of leases in the Act which calls for comment is the gap between the leases for less than 21 years which may not be registered and those for more than 40 years which must be registered in a compulsory area upon creation or assignment. The reason why leases for 21–40 years are left suspended, like Mahomet's coffin 'twixt Heaven and Earth, escapes the present writer although it no doubt exists. What is more important is that the effect of the provisions appears to be obscure.

Suppose Blackacre to be in a compulsory area but to be unregistered, not having been sold for many years. V, the owner of Blackacre, grants a lease to T for 35 years. There is no obligation to register the lease: as has been emphasised above (p. 87) the creation of leaseholds is not a transaction in which the registered system scores for simplicity and T, not being compelled to register, does not think of doing so. Blackacre is then sold to P. What is the position of T's lease which, be it noted, is a full-blooded legal estate? It is not an overriding interest under section 70 (1) (k) because it is over 21 years. It may be an overriding interest under section 70 (1) (g) if T is in actual possession, as he probably will be: there is, however, just an element of doubt about this. This is a slightly different case from that of the non-assignable lease; that lease could not have been registered; this lease might have been registered but did not need to be. Nevertheless it is suggested that, however necessary it may be to curtail the effects of subsection (1) (g), it must yet be wide enough to cover this case because, if it did not, the effects would be peculiar. On the one hand, T's lease would be a perfectly sound legal interest within section 1 and the Law of Property Act, 1925, s. 205 (1) (xxvii), whilst on the other hand, if it were not an overriding interest it would be a minor interest and one, moreover, which is absolutely bare of protection.

T cannot have an entry placed on the charges register until Blackacre is registered. Since Blackacre will usually be registered on a sale it will then be too late to register effectively.

One is driven to the conclusion that section 70 (1) (g) will have to be much more potent in effects than some writers would wish it to be. *Woolwich Equitable Building Society* v. *Marshall and Anr.* [1951] 2 All E.R. 769, discussed at some length by the present writer at Vol. 15, pp. 385–8, is a recent example of its effect. Of course, T may be a very far-seeing man and decide to guard against all this trouble which may arise on the first registration of Blackacre by registering his lease. But in some cases he will have to decide to do so promptly. If there is a grant of a 22-year term T will only have twelve months in which to register, for after that period his lease will be (a) incapable of registration, and (b) not an overriding interest under section 70 (1) (k), so it will have to stand or fall by section 70 (1) (g).

So much for leases of 21 to 40 years which are existing on first registration. What of the creation of a term of (say) 30 years by a registered proprietor under the powers conferred upon him by section 18 (1) (e)? It is submitted that the position is little, if any, different from that which applies to non-assignable leases. Since such a lease is over 21 years it is not within section 19 (2) (a), and it should therefore be completed by registration under section 19 (2) despite the fact that it may or may not be an overriding interest. Of course it will be observed that this is a case in which Dr. Potter's tentative limitation would apply and if it did it might be argued that the lease was an overriding interest *qua* first registration but not otherwise—scarcely a satisfactory state of affairs.

Reversionary Leases

Finally, consider the case where V, being owner of Blackacre, which is unregistered land in a compulsory area, grants on January 1, 1952, a lease at a fine for a period of ten years to take effect upon the expiry of an existing lease on January 1, 1953. On July 1, 1952, Blackacre is sold and in due course becomes registered. Now that lease is (a) not of itself registrable (section 8 (3)); (b) not an overriding interest under either section 70 (1) (g) or (k); (c) not capable of protection as a minor interest because there is no registered title against which to note it. The inevitable result seems to be that, although it is a legal estate, it must be liable to be defeated on a sale and consequent registration of Blackacre. Unless, indeed, it is suggested that every leaseholder in the land should register a caution against first registration of the freehold reversion.

Conclusion

We have seen that some leases which are not overriding interests under section 70 (1) (k) may yet be such under section 70 (1) (g) although one cannot but feel that if they do bring themselves within the latter subsection they are entering by a door which was not, perhaps, provided for them. We have also seen that there may be a perfectly sound legal term of years which cannot possibly be an overriding interest. It remains to consider, briefly, how the rights of the parties are or are not adjusted by the provisions for rectification and indemnity.

If, on first registration, the tenant can get his lease, one way or the other, into the charmed circle of overriding interests then the Register will be rectified in his favour (*Chowood* v. *Lyall*, *supra*) and the registered proprietor will get no compensation (*Re Chowood*, *supra*). This, of course, is exactly on a par with the unregistered position where a purchaser would take subject to a prior legal estate and be remitted to his remedy under his covenants for title. But it is no advertisement for the "State-guaranteed title." If on the other hand, the tenant cannot get within section 70 one way or another then it seems that his legal estate will be lost unless it be that this is a case which would come within section 82 (1) (h) and it would be considered unjust not to rectify against the registered proprietor in possession.

This question of the rights of leaseholders has been examined at some length because it illustrates the great dilemma of the registered system. On the one hand, if overriding interests are too widely drawn the "State-guaranteed title" becomes almost meaningless; on the other, if overriding interests are not wide enough innocent owners of legal estates will be dispossessed. It is not proposed to suggest any alteration to meet this fundamental difficulty; it is suggested, however, that the position of leaseholds might be made considerably less involved without any ill effects if the following three amendments were considered :—

(a) Leases with covenants against assignment to be placed upon the same footing as any other lease.

(b) Leases for less than 21 years to be equally overriding interests whether or not a fine has been taken.

(c) Either leases up to 40 years to be overriding interests under section 70 (1) (k) or, alternatively, leases over 21 years to be registrable under section 123 (1).

ESTATE CONTRACTS AND THIRD PARTY INTERESTS GENERALLY

Something has already been said about specific difficulties attaching to easements and to restrictive covenants in the registered

system. Both of these may, of course, be described as third party rights and (so far as an easement may be equitable) both would in the unregistered system be protected by registration under the Land Charges Act, 1925. It is now proposed to consider third party rights generally with special reference to estate contracts which, apart from mortgages and charges, are perhaps the matters most usually registered under the Land Charges Act, 1925. The matter is a source of troubles and difficulties under either system, but the difficulties vary as between the two systems largely because the respective principles of registration are fundamentally different. In the unregistered system registration is against the name of the proprietor; in the registered system it is against the registered title.

Some of the difficulties attending the registration of estate contracts (with particular reference to options contained in leases) have been indicated by the writer at vol. 15, p. 391, and it is not proposed to go into the matter anew. One or two of the difficulties attending the registered system have been noted at vol. 15, p. 379, and at p. 11, *ante*, and it may be permitted to enlarge a little upon what was there said.

The registered system provides four methods of protecting minor interests upon the Register. Of these the inhibition is rare and need not trouble us further, and the restriction is designed to protect interests which may be overreached which are not in mind at the moment. The normal method of protecting non-overreachable third party interests is by notice or by caution. If a notice is entered on the Register it binds any subsequent dealing by the registered proprietor and hence it is, so far as the land against which it is registered is concerned, exactly equivalent to registration under the Land Charges Act. In order, however, that a notice may be entered it is necessary for the Land Certificate to be forwarded to the Registrar; hence it is impossible to register a notice without the co-operation of the registered proprietor. This difficulty may be met with in the early stages of a proposed sale. If the land is unregistered the prospective purchaser, if so advised, may register his contract under the Land Charges Act, 1925, and so registered it will bind anyone to whom the vendor might dispose of his land. In the case of registered land the purchaser will not have the Land Certificate at that stage and so cannot register without the assistance of the vendor.

If the concurrence of the registered proprietor cannot be obtained then the person claiming rights over the land may register a caution under section 54 (1), but this cannot be described as an ideal method of protection. The application requires to be supported by a

statutory declaration and, since it is a hostile proceeding, may give rise to a claim for damages (section 56 (3)). Furthermore the measure of protection which is afforded falls far short of that which is obtained by a notice or by registration under the Land Charges Act. The effect is only to give the cautioner a right to receive notice of any impending dealings with the land and a right to be heard in opposition to them. That is to say, he does not get automatic protection but must take active steps to safeguard his interests (see section 55), and it would appear that the land would not be bound unless the entry of a notice is obtained before transfer.

It is a matter to be considered whether it would be possible to amend the Act and rules to permit the registration of a notice without production of the Land Certificate just as a charge may be registered under the Land Charges Act, 1925, without production of the title deeds. No doubt such an innovation would have repercussions in other parts of the system but they could perhaps be overcome. For example, the valuable method of taking a charge by deposit of the Land Certificate protected by notice (which is adverted to below) would be slightly affected in that now such a chargee knows that no notice can be registered without his consent although, of course, a caution can be entered without such consent. If it were possible to enter a notice without production of the Land Certificate then notices could be entered without the knowledge of the chargee, but he would not be prejudiced if the new notice operated subject to his notice of deposit. The position would be similar to that obtaining under the Land Charges Act, 1925, where a person registering a new charge takes his rights thereunder subject to what may already be on the Register.

It has been noted at p. 11, *ante*, that the type of estate contract which was considered in *Turley* v. *Mackay* [1944] Ch. 37, which, if registered against the name of the proprietor, effectively binds unspecified land to be acquired by him in the future cannot be protected in the case of registered land because that system is founded upon registration against title and not against the name of the owner. In other directions, however, the registered system appears to provide better protection for the owner of the adverse interest, and in this connection the protection of an option to purchase granted by a lease to the lessee may be examined.

Options in Leases

The difficulties in the way of such a lessee-option holder of unregistered land have been indicated at vol. 15, p. 391. His trouble is that the Law of Property Act, 1925, s. 44 (2), may prevent

him from having any knowledge of the lessor's title and so he may be led to register against the wrong name. In examining the protection afforded by the registered system we may consider separately cases where the lease is granted before and after first registration. In the ordinary way the option will have been registered under the Land Charges Act, 1925; hence, upon first registration it will be apparent upon the title and so will be noted on the Register. The peculiar thing is that if it was not in fact effectively registered under the Land Charges Act, 1925, it is at least possible to argue that it is in some circumstances protected as an overriding interest. It has already been noticed that a lease existing upon first registration may be an overriding interest under section 70 (1) (g) rather than under section 70 (1) (k) and, indeed, may be within both. The question is whether the protection afforded by section 70 (1) (g) is confined to the lessee's rights *qua* lessee or whether it also extends to his collateral rights as option holder. It is submitted that in fact it does extend to such rights. The words of the subsection themselves are in no way restrictive and would extend to collateral rights. Furthermore, it was discussed and applied by Danckwerts J. in *Woolwich Equitable Building Society* v. *Marshall* [1951] 2 All E.R. 769, and at p. 773 the learned judge expressly equated section 70 (1) (g) with the old doctrine of *Hunt* v. *Luck* [1902] 1 Ch. 428. Now it appears from *Daniels* v. *Davison* (1809) 16 Ves. 249 that that doctrine covered the whole of the tenant's rights even though collateral to the tenancy.

If a lease is granted and the lessee, upon searching the parcels index, discovers that the land in question is registered he will forthwith see that his lease is registered under section 19 (2) unless it is within para. (a) of the proviso to that section. If the entry of the lease upon the charges register includes a note of the option he will be protected. If the lease is within the proviso the lessee would be wise to register a notice, or at any rate a caution, in respect of the option. But even if he did not it might be that the option was an overriding interest under section 70 (1) (g) if the lessee was in possession.

A further difficulty might arise if the option were contained in a sub-lease and the matter might be further complicated if the head-lease were registered whilst the freehold reversion were not. But if the option-holder registers against his immediate lessor's title he is at any rate in a comparable position to that which would have been enjoyed by the option-holder in *Sharp* v. *Coates* [1949] 1 K.B. 285 (vol. 15, p. 390) had he registered as it was there held that he should have done.

Patman v. *Harland Redivivus*

Few tears can have been shed by even the most conservative of conveyancers when the rule of *Patman* v. *Harland* (1881) 17 Ch.D. 353 was abrogated in 1925. It is, therefore, a little surprising to find this hoary old monster, having been expelled from the unregistered system, rearing its head in the "modern" system of registered conveyancing. It will be recalled that in *Patman* v. *Harland* the plaintiff sold land to A subject to a restrictive covenant. A sold to B who leased part of the land to the defendant. The defendant had an open contract for a lease and was debarred by statute from inquiring into the freehold title, but it was nevertheless held that he took subject to the restrictive covenants since he might, by express stipulation, have insisted upon seeing the freehold title.

In the case of unregistered land this doctrine was laid low by the Law of Property Act, 1925, s. 44 (5), which provides that where the lessee has no right to call for the freehold title he shall not be affected by any matter of which he would have had notice had he called for that title. On the other hand, he takes subject to all charges registered in the Land Charges Register. A search of that Register is, of course, a search against a name and generally (although not always) there is no difficulty in discovering any burdens which may be binding on the lessee.

In the case of registered land it was decided in *White* v. *Bijou Mansions* [1937] Ch. 610 that a lessee who, under an open contract, was not entitled to inspect his lessor's title was nevertheless bound by restrictive covenants entered thereon; briefly, because section 20 renders any disposition by a registered proprietor subject to the entries on the register and restrictive covenants (or other third party rights) are entries within the meaning of that section.

There are three types of transaction which may be affected by this decision. On the grant of a lease the intending lessee under an open contract has no right to inspect the Register, and hence it is prudent to insert in the contract a stipulation that the lessor will give an authority to search. In the case of the grant of a sub-lease, whilst the intending sub-lessee can demand that his immediate lessor should give such an authority, there does not seem any way of compelling the owner of the freehold reversion to permit search. Similarly, on the assignment of a lease it is unlikely that the registered proprietor of the freehold reversion will be disposed to authorise the inspection of his title even when a search of the Index of Parcels has shown that it is registered. It is appreciated that comparatively few leases are granted pursuant

to contracts but, in the case of unregistered land, the lessee can at least search against the lessor under the Land Charges Act, 1925.

Most of the difficulties which arise from *White* v. *Bijou Mansions* are avoided if when a lease is registered it is registered with absolute rather than with good leasehold title. This does not assist the lessee for less than 21 years or the lessee under a lease for any number of years with a covenant against assignment. Nor will it necessarily commend itself to the lessee for something between 21 and 40 years who does not wish to register his lease as such at all. The difficulties arising out of section 44 (2) Law of Property Act, 1925, are by no means confined to the registered system, but the matter is more important in that system because the Land Charges Register is open to inspection by anyone interested if the name of the lessee or owner of the freehold reversion is available whilst the Land Register is not. There is also this to be said for some amendment of section 44 (2) in the case of registered land: that section was presumably intended to simplify the investigation of title which is required upon a grant of a lease; if the registered system is as simple as it is claimed to be it would only be necessary for the lessee to look at one document.

Estate Duty Charges

To appreciate the relative merits of the two systems so far as charges for estate duty are concerned it is well first to consider the relative provisions as to accountability and charges in the Finance Act, 1894. By section 8 (4) of that Act, where property passes on a death and the executor is not accountable, "Every person . . . in whom the same is vested in possession by alienation . . . or other derivative title . . . shall be accountable for Estate Duty on the property." But by section 8 (18) nothing shall render accountable a bona fide purchaser for value without notice. By section 9 (1) a rateable part of the estate duty upon an estate in proportion to the value of any property which does not pass to the executor as such shall be a first charge upon the property in respect of which the duty is leviable, provided that the property shall not be so charged against a bona fide purchaser for value without notice.

These provisions give trouble to conveyancers when a purchaser has actual or constructive notice within the Law of Property Act, 1925, s. 199, of the existence of a gift *inter vivos*. In the case of unregistered land a charge arising under section 9 (1) is registrable under section 10 (1) Class D (1) of the Land Charges Act, 1925, and hence, if there has been a gift *inter vivos* and the donor has since died, the purchaser can search the Land Charges Register and

if he finds no entry will be protected by section 13 (2) of the Land Charges Act, 1925, and Law of Property Act, 1925, ss. 17 and 198, and so will take free of the charge. The liability to account under section 8 (4) of the 1894 Act is not a charge upon land and is not registrable so that the liability of a purchase would seem to rest upon notice pure and simple.

Where a purchaser has knowledge of a gift and the donor is still alive his position is even more unsatisfactory. In such circumstances there is a presumptive charge which will, as it were, crystallise upon the premature death of the donor, and such a charge is not it seems capable of registration in the Land Charges Register. Hence, the purchaser is bereft of the protection of Land Charges Act, 1925, s. 13 (2), and Law of Property Act, 1925, s. 198: it is possible that section 17 of that Act may be wide enough to protect him, but this is very doubtful. The learned editors of Hanson on Death Duties (9th ed., p. 192) suggest that notice of a potential claim would not be enough to deprive a purchaser of protection: one differs from "Hanson" with reluctance, but it appears that this proposition is also most doubtful. Thus, the position of the purchaser of unregistered land who has notice of a gift *inter vivos* is extremely doubtful.

A purchaser of registered land appears to be in a much stronger position. Section 73 (1) provides that "A registered disposition in favour of a purchaser shall operate to vest in him the estate or interest transferred or created by the disposition free from all claims of His Majesty for death duties notwithstanding that notice of a claim for duties may be noted on the register under this section." It is further provided that the claim is shifted onto the proceeds of sale, as is the case with unregistered land where Law of Property Act, 1925, s. 17, applies. There can be no doubt that section 73 (1) is wide enough to protect a purchaser from any claim under the Finance Act, 1894, s. 9 (1), and it also seems wide enough to free him from the personal liability to account imposed by section 8 (4) of that Act although this is perhaps rather more doubtful.

MORTGAGES

It is scarcely necessary at this stage to inform the reader that this article is couched in a somewhat critical vein: it is pleasing, therefore, to turn to a second branch of the registered system which seems to equal or surpass the facilities offered by the unregistered system. There are, however, some differences in the effects of charges as between one system and the other, and it might be of value to those practitioners who are unfamiliar with the registered system if the two were compared in certain particulars.

Mortgages or charges of unregistered land may be either legal or equitable: the former either by a demise for a term of years with a provision for cesser upon redemption of the debt or by a charge expressed to be by way of legal mortgage which confers the same rights upon a chargee as upon a legal mortgage by demise (Law of Property Act, 1925, ss. 85, 87). An equitable mortgage may be created by simple deposit of the title deeds if there is an intention to create a charge (*Russell* v. *Russell* (1783) 2 W. & T. L.C. 76), but in order that there may be no dispute as to the existence of such an intent it is usual for the deeds to be accompanied by a memorandum of deposit in which the borrower undertakes to create a legal mortgage if called upon so to do. If such a memorandum is under seal the lender can exercise the powers of sale given by Law of Property Act, 1925, s. 101, but he cannot convey the legal estate unless the memorandum constitutes him attorney for this purpose. Finally, of course, land may, by agreement, be equitably charged without the deposit of deeds.

Registered Charge

The disposition of registered land corresponding to the legal mortgage is the registered charge which may or may not follow the statutory form (L.R. Form No. 45). Usually it does not. Upon registration the charge takes effect as a charge by way of legal mortgage and the position of the lender is almost, but not quite, the same as that of a legal mortgagee of unregistered land. The differences subsisting between the two may be indicated under six heads.

First, by section 28 there are implied in any registered charge, whether in statutory form or not, covenants which are operative unless expressly varied or excluded. They are:—

(a) A covenant by the registered proprietor to pay the principal sum charged and interest thereon at the appointed time and rate.

(b) A covenant, if any part of the principal sum is unpaid at the appointed time, to pay interest thereon at the appointed rate as well after as before any judgment.

(c) In the case of leasehold land to perform the covenants of the lease.

Hence, if for any reason, as, for example, a mortgage by trustees, it is desired not to have covenants of this nature they must be expressly excluded.

Secondly, in the unregistered system by the Law of Property Act, 1925, s. 116, a mortgage term automatically becomes a

satisfied term and ceases on repayment without the need for any receipt or reconveyance. In the registered system it enures until it is discharged by entry to that effect in the Registry as a result of lodging either the prescribed form or some other evidence of satisfaction.

Thirdly, neither the Law of Property Act, 1925, s. 115, nor any other comparable provision applies in the case of registered land, and a registered charge will only be transferred on the registration of a transfer which, unlike the charge itself, must be in the prescribed form.

Fourthly, the priorities of registered charges are determined in the simplest manner possible. Section 29 provides that they shall rank according to the order of their registration, and in this the registered system is undoubtedly simpler than the unregistered.

Fifthly, tacking is dealt with in section 30, as amended by the Law of Property Act, 1926. If the first charge contains an obligation to make further advances the extent thereof would be entered on the Register, and advances made under that obligation would take priority of all charges registered subsequently to the first. If the first charge does not bind the mortgagee to make additional advances but is merely expressed to cover additional advances, then the lender would not be protected as to any advances made after he has had notice of the second charge. It is provided, however, that the Registrar is to give him notice before making any further entry on the Register, and on failure to receive such a notice the chargee is entitled to an indemnity unless he has failed to keep the Registrar informed of his correct address.

Sixthly, it will be recalled that in the unregistered system, consolidation is excluded unless a contrary intention is expressed in at least one of the deeds concerned. This is not the case in the registered system. By rule 154 the right to consolidate can only be registered against other land expressly mentioned in the charge or where an express application is made to note it against specified land, and by section 25 (3) (ii) a charge cannot affect any registered land other than that in respect of which it is registered. Now, in so far as a registered charge reserves the right to consolidate with an existing registered charge there is no difficulty since the provision could and would be noted against the original. The difficulty arises when considering the effect of a clause preserving the right to consolidate generally. It would seem that this must be the case contemplated in which "express application" may be made and that the right could and would be noted against the title to other land affected provided that that land was still registered in the name of the original borrower. If, however, the title to the land

was in the name of a transferee for value from that borrower it would appear to be too late to have the right of consolidation noted since such a noting could not be reconciled with sections 20 and 23 by which a transferee takes free of all non-overriding interests not on the Register at the time of registration. It would therefore appear that the doctrine of *Pledge* v. *White* [1896] A.C. 187 has no place in the registered system, and it cannot be said that that system is any the worse for that.

Unregistered Charge

By section 106 and rules 223 to 228 registered land may be effectively mortgaged in any way which would have been effective in the case of unregistered land: if, however, the charge is not registered it takes effect as a minor interest only and so may be overridden. But, of course, there are means of protecting minor interests, and the procedure to be adopted differs as between a charge by deed and a charge under hand.

If the charge is by deed the chargee, under section 106 (2), may enter a special form of mortgage caution (which must be in the prescribed form—rule 223). When this is done the chargee will be able to have himself at any time registered as a registered chargee with priority as from the date of the caution. In the meantime his rights, from a practical standpoint, will be much the same as those of a registered chargee, but he will be unable to make a disposition of the registered estate should he wish to exercise his power of sale. It is, as in the case of unregistered land, open to the chargee to take a power of attorney to transfer the legal estate, and if this is done it should be filed at the Registry (rule 82).

If the charge is under hand it can only be protected by the ordinary form of caution entitling the cautioner to notice of any proposed dealing with the land and to an opportunity to appear before the Registrar with a view to having the caution continued.

It is difficult to see any valid reason for adopting the unregistered charge as a means of security since it is no cheaper than a registered charge, and in practice one or other of the alternative methods will be adopted.

Deposit of Land Certificate

A very simple and convenient method of taking a charge over registered land by deposit of the Land Certificate is available under section 66. By that section the security is defined as:—

> " equivalent to a lien created in the case of unregistered land by the deposit of documents of title . . . by an owner entitled for his own benefit to the registered estate."

It is a little peculiar that the statute should envisage the charge created by deposit of the title deeds to unregistered land as a lien in that a better basis is the implied contract to create a charge when called upon, but nothing really turns upon the matter. It appears that the effect of section 66 is to give the lender a security, subject to anything appearing on the Register itself, unaffected by any want of equity in the deposit whether or not the lender ought to have known of it.

Such a deposit may be and should be protected by notice and this may be done in one of two ways. The proprietor may deposit the Land Certificate with the lender and the latter give notice of the deposit describing the land by reference to the Register or, alternatively, the registered proprietor, before making the deposit with his creditor, may give notice to the Registrar. Such notice should be signed by the proprietor and must indicate the name of the lender: it need not be in any particular form and should be accompanied by the Land Certificate. The Registrar will register the notice and forward the Land Certificate to the indicated chargee.

In either case the notice of deposit operates as a caution under section 54, and as Brickdale and Stewart-Wallace suggest at p. 489, the lender's protection is threefold:—

(a) No transfer, charge or other disposition of the land can be made unless the chargee lends the Land Certificate for the purpose.

(b) No one can deal with the land without acquiring notice of the chargee's equitable rights.

(c) The chargee is entitled to fourteen days' notice of any intended disposition and may appear before the Registrar.

In short it can be said that the registered system is at its best and at its most flexible when dealing with charges and mortgages. It provides alternative methods which correspond to the methods of charge available in the unregistered system, and whilst the rights under a registered charge may be slightly different from those under a legal mortgage or charge, yet it cannot be said that those differences are on balance unfavourable to the registered system. Furthermore, the deposit of the Land Certificate protected by a notice provides a simple and easy charge for temporary purposes which undoubtedly provides more security for the lender than does the analogous procedure in the unregistered system. There is the one drawback that the borrower cannot effectively deal with his equity of redemption without the concurrence of the lender.

Summary

1. It is suggested that the following alterations in Land Registry practice are desirable.

(a) If the documents presented for registration describe the land in a particular manner (*e.g.*, field acreages and states of cultivation) that description should be recorded on the Register.

(b) If boundaries are described with some degree of particularity or if T-marks are included in documents presented for registration that description or those marks should be reproduced although it may be provided that their correctness is not guaranteed unless the boundaries are "fixed" under rule 276.

(c) All easements which are appurtenant to the dominant tenement should be set out in the property register in the terms of the grant and accompanied by such plans as the parties (not the Registrar) consider necessary.

(d) All easements created by express grant should be noted in similar terms on the charges register of the servient tenement.

(e) Restrictive covenants should be set out in full whether or not they exceed a page of the Register.

(f) Positive covenants should be noted on the Register.

(g) Where there have been indemnity covenants the transfers should be bound up with the land certificate.

(h) If a transfer contains a recital or statement of user that should be recorded on the property register.

(i) The claim to compensation from the £300,000,000 fund, if assigned by a transfer, should be recorded on the property register.

2. It is suggested that alterations in the Land Registration Act, 1925, on the following lines should be considered.

(a) It should be made clear that incorporeal hereditaments existing in gross may be registered as separate titles whilst those appurtenant to land may not.

(b) The provisions as to the registration of leases should be reviewed upon the lines suggested at p. 176, *supra*.

(c) Possibly the ambit of section 70 (1) (g) should be more clearly defined and perhaps restricted.

(d) It should be made possible to register a notice without production of the Land Certificate.

(e) Section 82 (3) (a) might be reconsidered in the light of *Re* 139 *High Street, Deptford, supra*, with a view to its strengthening.

(f) Section 44 (2) Law of Property Act, 1925, might be made inapplicable to registered land.

3. If these suggestions were adopted it seems that the situation which would then obtain might be summarised as follows:—

(a) The registered system would be sometimes less simple and sometimes simpler than the unregistered. It would never be very much simpler than the unregistered system, first because, if the parties are to be in an equally advantageous position, the land certificate must look very much like a bound-up abstract and secondly, because, on a sale, questions of pure title are the least part of the work to be done.

(b) The registered system would be dearer than the unregistered on first registration but cheaper on subsequent transfer. How much cheaper it would be and how long it would continue to be cheaper would depend upon how long the position obtains that the disparity of remuneration allowed to solicitors is markedly greater than the disparity of work. If and when that disparity is done away with, no matter which scale is amended, the cost will be much about the same.

4. It would then be for some impartial tribunal such as a Royal Commission or Departmental Committee to consider which system was the more advantageous to the country as a whole, bearing in mind that any registered system involves the employment of a registration staff: economically this is only justifiable if the benefits of the system for the community are great enough or if the employment of that staff is offset by a corresponding or greater diminution of solicitors' staffs.

PRIVATE CONVEYANCING AND PUBLIC SEWERS

By J. F. Garner, LL.M., Solicitor, Town Clerk of Andover

What is meant by the term "public sewer," and why is the question of importance to the conveyancer in private practice? It is the purpose of the present article to attempt to answer this problem, and it is proposed first to justify a discussion of the subject for private practitioners.

In the normal conveyancing transaction, a purchase or a mortgage, the acquiring solicitors are normally satisfied with the routine inquiries on the subject in preliminary inquiries (or in requisitions) made of the vendor, and in the inquiries of the local authority usually made supplementary to the local land charges search. It is suggested that the replies to these queries merit closer attention than they customarily receive. The "physical" condition of the sewerage system (if any) by which the premises are served should, of course, as is customarily the case, be checked by a competent surveyor (if possible, before contract), but if it appears in the replies to the above-mentioned queries that the property is served by a combined drain, some attempt should be made to ascertain the exact liability of the property in the matter of its maintenance (and it will normally be as well to inquire whether it has given trouble before) (*a*). If the property is not adequately drained, or is not served by a public sewer, the exact location of the nearest public sewer should be ascertained (*b*). If a public sewer runs under the property sold, and its existence is not disclosed before contract, this may amount to a latent defect such as will entitle the purchaser to rescind (*c*).

The expression "public sewer" is now defined by section 20 of the Public Health Act, 1936, to mean any sewer which is vested

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(*a*) In particular, it will normally be necessary to decide whether it is a length to which s. 24 of the Public Health Act, 1936, applies; which in itself will often need a decision on the question whether or not the drain was a "single private drain" within the meaning of s. 19 of the Public Health Acts Amendment Act, 1890 (see below).

(*b*) Section 34 of the Public Health Act, 1936, gives an absolute right to the owner or occupier of premises within the local authority's district to make his drains or sewer to communicate with any public sewer of the authority.

(*c*) See *McGrory* v. *Alderdale Estate Co.* [1918] A.C. 503. In *Re Belcham and Gawley's Contract* [1930] 1 Ch. 56, the existence of the sewer did not substantially interfere with the enjoyment of the property, and it was held that the case would be met sufficiently by payment of compensation.

in the local authority under the terms of that section, but unfortunately this definition incorporates, by reference, much of the pre-1936 law on the subject, which was, and is still, in a notoriously unsatisfactory state. In the first place, "sewer" is only defined negatively, by way of the exclusion of "drains", and it is also necessary to know what was meant by the term "sewer" *before* 1936. Without going into too many technicalities in the present context, a "sewer" may for most purposes be described as a conduit for drainage of foul or surface water from buildings, usually of artificial construction (*d*), which does not drain one building only, or buildings within the same curtilage (*e*). In order to be a sewer, the conduit must *drain*; *i.e.*, it must have an outfall, and it will not be a "sewer" in law if it leads merely to a cesspool or cesspit, as distinct from treatment works or a natural outfall such as a river or the sea (*f*).

Having decided that a particular conduit merits the description "sewer," it is then important to decide whether or not it is a "public sewer"; *i.e.*, whether or not it is vested in the local authority. There are five classes of sewers so vested, by virtue of section 20 (1) of the Public Health Act, 1936:

(a) Sewers vested in the local authority immediately before the passing of the 1936 Act, by virtue of the provisions of the Public Health Act, 1875.

Under the 1875 Act, the term "sewer" was defined much as above described, the important feature being that it must have drained at least two buildings not within the same curtilage, but not necessarily separately owned. Highway drains were not within the definition, and sewers constructed for private profit (*g*), or merely as land drains, did not vest in the authority under the 1875 Act.

(b) Combined drains, which would have been vested in the authority but for some provision in an enactment or

(*d*) A natural stream could not become a sewer by mere pollution, subsequent to the passing of the Rivers Pollution Prevention Act, 1876, but before that date, a natural stream might have become a sewer (see *George Legge & Son* v. *Wenlock Corporation* [1938] A.C. 204). It seems that this might have been caused merely by surface water: *Greyhound Racing Association Trust, Ltd.* v. *Edinburgh Corporation* (1951) 101 L.J.Newsp. 623—a Scots case.

(*e*) The term "curtilage" itself has caused considerable difficulty in this context: see, *e.g.*, *Harris* v. *Scurfield* (1904) 68 J.P. 516.

(*f*) *Clark* v. *Epsom R. D. C.* [1929] 1 Ch. 287, and cases there cited.

(*g*) This also is a point which has caused difficulty in the past, but it seems to be largely a question of fact whether or not a particular sewer was constructed for profit—sewers constructed solely for the drainage (and thereby improvement) of agricultural land are normally regarded as having been made for profit: see *Phillimore* v. *Watford R. D. C.* [1913] 2 Ch. 434, and *Southstrand Estate Development Co.* v. *East Preston R. D. C.* [1934] Ch. 254.

statutory scheme (*e.g.*, under a planning scheme made under the pre-1947 Act planning legislation).

(c) All sewers constructed by the local authority (or their predecessors in title), at their expense.

Sewers constructed subsequent to the coming into operation of the Act of 1936, namely, October 1, 1937 (*h*), however, do not become public sewers unless and until they have been declared to be such by the local authority under section 20 (2) of the 1936 Act. This is one of the great changes in the law made by the 1936 Act, and when all the pre-1936 sewers have disappeared, the law on the subject should be a great deal simpler !

(d) All sewers constructed under any enactment relating to the sewering of private streets (*i*).

(e) All sewers with respect to which a declaration of vesting is made by the local authority under section 17 of the Act; this relates normally only to sewers constructed subsequent to the 1936 Act. The procedure for adopting a private sewer is somewhat complicated, and need not be examined in the present context, but all owners of the sewer affected have to be given an opportunity of appealing to the Minister of Housing and Local Government before a particular proposal to adopt a sewer will take effect.

Having decided that a particular conduit is a public sewer, it should then be appreciated that it is the responsibility of the local authority to " maintain, cleanse and empty " the sewer (1936 Act, s. 23); the authority will, moreover, normally be responsible if the condition of the sewer is such that it causes a nuisance. This is not, however, the end of the matter, so far as the owner of property served by the length of sewer is concerned, for if it is a " length to which the section applies," the authority will be able to recover from such owners (*j*) any expenses reasonably incurred by them on works of maintenance (*k*) to that length of sewer.

(*h*) 1936 Act, s. 347 (1).

(*i*) *i.e.*, s. 150 of the Public Health Act, 1875, the Private Street Works Act, 1892, or the corresponding provisions of local legislation.

(*j*) The authority are required to apportion their expenses among the respective owners concerned in such proportions as they " deem it fair to fix "; there is, however, a right of appeal to the local magistrates against such apportionment (see s. 24 (3)).

(*k*) It is by no means clear whether or not this expression, as used in the present section, includes mere cleansing (which operation, as well as " maintenance " *simpliciter* is the initial responsibility of the authority under s. 23). In practice, some local authorities interpret the expression in one way, some in another, and so far as we are aware, the point has not been before the superior Courts. On balance, we are inclined to the view that, by analogy to the use of the two expressions in s. 23, the legislature has intended " cleansing " and " maintenance " to be mutually exclusive.

This liability, which arises irrespective of any fault on the part of a particular owner, will attach in respect of the following two classes of public sewer (or rather, lengths thereof):

(a) a length for the maintenance of which private individuals were responsible before 1937 under some statute (*l*) or scheme relating to combined drains or under a combined drainage agreement enforceable (*m*) by the authority (*n*);

(b) a length vested in the authority prior to 1937, but not constructed at their expense, and lying in a garden, court or yard belonging to any of the premises served by the sewer, or under a building or access road or passage which is not a public highway (*o*).

It is not necessary to prove that the particular length could be brought under both these headings, as they are alternative, but in some circumstances the "length" may in fact fall within each paragraph.

One further point may be worth mentioning in this connection, by way of emphasising the importance of ascertaining the exact route of a public sewer through a property. Under section 25 of the 1936 Act, plans for the erection of a building will not be passed by the local authority if they show that a building will be erected over any sewers shown on the local authority's sewer map (*p*), unless they are satisfied that they can agree to the proposal in the particular case. Moreover, if a building has been erected, before 1937, over a sewer without the consent of the local authority, they may require its removal or alteration (*q*).

(*l*) The commonest example in practice was s. 19 of the Public Health Acts Amendment Act, 1890 (an adoptive Act), under which the local authority could recover the cost of carrying out repairs to a "single private drain." Unfortunately, this expression has received such elaborate judicial explanation that it has become almost incapable of logical comprehension, and we can only refer practitioners faced with a particular problem to such cases as *Wood Green U. D. C.* v. *Joseph* [1908] A.C. 419, and *Hill* v. *Aldershot Corporation* [1933] 1 K.B. 259. Generally, but not invariably, a single private drain will be found to be a combined drain, laid at private expense and in private land, serving at least two houses in separate ownership.

(*m*) Unless the agreement was entered into under a town planning scheme or some local Act, a combined drainage agreement will not normally have been enforceable by the local authority against purchasers from the original parties thereto.

(*n*) Abbreviated from s. 24 (4) (a).

(*o*) Abbreviated from s. 24 (4) (b).

(*p*) This sewer map is open to public inspection at the local authority's offices, and should be consulted in cases of doubt: see s. 32 of the 1936 Act.

(*q*) See s. 25 (3); no statute of limitations seems to apply to this power.

MINES AND MINERALS

By J. B. Sweetman, ll.b., Solicitor

It is thought that conveyancers whose practice does not normally extend to areas in which minerals are worked may find it useful to have a general picture of the rather specialised branch of property law which deals with the ownership and working of minerals and the right of support of property over the mines where such working takes place.

The chief mineral deposit found in this country is, of course, coal, and almost all coal is vested in the National Coal Board by virtue of enactments which will be referred to later. It is well, however, to recall now that in some parts of the country other minerals are of much more importance than coal—*e.g.*, ironstone and china clay. It follows that it would be entirely wrong to dismiss the subject on the assumption that, for practical purposes, a purchaser, who must naturally buy subject to the statutory rights of the National Coal Board, need pay no attention to the details of any mineral reservations or mining leases which are revealed on the title. In fact, his rights even vis à vis the National Coal Board are likely to be conditioned by the terms of those reservations or leases. Wherever there is coal or any other mineral likely to be worked in the area, the position should be carefully investigated by reference to the title deeds.

It is hardly possible to consider the existing situation adequately without a brief outline of the historical process by which it has arisen. At common law, all mines and minerals belonged to the owner of the surface with the exception of gold and silver which belonged to the Crown (*Case of Mines, R.* v. *Northumberland (Earl)* (1567) 1 Plowd. 310 at p. 336). He could, of course, grant leases or tenancies of the minerals, and by manorial custom copyhold tenants were in many cases entitled to work and win minerals. On the other hand, in many cases the manorial custom was the exact converse—the right to work and win minerals was reserved to the lord of the manor. Questions of rights of surface owners to support from the minerals, whether subjacent or adjacent, had to be determined by reference to the general law of support, which needs no repetition here. (It must, however, be mentioned in stating the general position at common law that there were special customs applicable to the "Stanneries" (tin mining districts in

Devon and Cornwall), the High Peak district of Derbyshire (where some lead mines existed) and the Forest of Dean. These customs have in the course of the centuries largely been replaced by a mass of statutory provisions of a local nature which are too detailed to deal with here.)

During the progress of the centuries, as mineworking assumed an increased importance, it was inevitable that a mass of case law should accumulate on questions of rights of support from minerals and liability for damage caused by subsidence as a result of mineworking. From this mass one may perhaps extract one or two cardinal principles.

1. A right of support is presumed to exist, but a right to withdraw support is not contrary to any rule of law, and in deciding whether a right to withdraw support has arisen the existence or non-existence of a clause providing for compensation in the event of damage being caused by mineral workings is an important (though not decisive) consideration.

2. The scales are always weighted against the person claiming to withdraw support, and no matter how wide may be the terms of a reservation of powers to work minerals, the court will not accept them as conclusively deciding the question of support.

3. Different considerations apply to withdrawal of lateral support as opposed to vertical support.

It was also to be expected that the advent of an industrial age would make it necessary to bring the common law into step with the times in certain respects by statutory provisions and to prevent the working of minerals in such a way as to damage the many public undertakings which began to spring into being. Most important of the provisions contained in statutes of the early Victorian era in this respect are those contained in sections 78–85 of the Railways Clauses Consolidation Act, 1845, (the so-called "Mining Code") which have subsequently been amended by the Mines (Working Facilities and Support) Act, 1923, and have been incorporated, either as originally enacted or as amended or with express modifications, in a great number of statutes dealing with the acquisition of land by public authorities—*e.g.*, the Development and Road Improvement Funds Act, 1909, the Local Government Act, 1933, the Education Act, 1944, the Housing Act, 1936, the Town and Country Planning Act, 1947, the Trunk Roads Act, 1936, and the Acquisition of Land (Authorisation Procedure) Act, 1946.

It would be beyond the province of this general note to go into the details of the "Mining Code" and of its subsequent amendment to cover the difficulties arising from the decision in *Howley Park Coal and Cannel Co.* v. *L. & N. W. Ry.* [1913] A.C. 11. It

must suffice to say that the original code provided that the railway company acquiring land did not acquire the minerals unless they were expressly included in the sale (s. 77). But a mine owner proposing to work minerals within a prescribed distance (usually 40 yards) of the railway had first to serve notice of approach, and the company could then offer compensation, thereby prohibiting the mine owner from proceeding (s. 78). If no compensation was offered, however, the mine owner could proceed and was not liable for normal damage (s. 79).

The Mines (Working Facilities and Support) Act, 1923 (Part I) (amended by the Mining Industry Act, 1926, and the Mines (Working Facilities) Act, 1934) provided for grant of rights of working minerals to persons unable to proceed because of lack of ancillary rights (including rights to let down the surface), and conversely for the imposition of restrictions on the working of minerals to ensure sufficient support for buildings or works. The grant of rights or imposition of restrictions was within the jurisdiction of the Railway and Canal Commission, but on its abolition, the High Court now exercises the jurisdiction (Railway and Canals Commission (Abolition) Act, 1949).

By Part II of the 1923 Act, the " prescribed distance " under the " Mining Code " was extended to what would be an adequate distance according to the depth of the seam, mine owners were placed under a liability to pay the cost of repairs to the railway even if caused by " authorised " workings, and conversely the railway was placed under an obligation to compensate for minerals which were " sterilised " by the provisions of the Act, even if outside the former 40-yard limit.

These rights were in substitution for the common law right of support, and the railway company had to rely on this amended " Mining Code " in place of its common law rights.

Somewhat similar provisions to those of the " Mining Code " laid down in the Railways Clauses Consolidation Act were contained in the Waterworks Clauses Act, 1847, an Act consolidating provisions as to construction of waterworks for supplying towns with water. This Act was incorporated in subsequent special Acts passed for such purposes and also applied to all sanitary works within the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883. The Act has now been repealed and replaced by the Water Act, 1945, which set up a modernised code which is, however, not dissimilar to that contained in the 1847 Act.

In general, ownership of minerals was little affected by legislation until the present decade, when there came into force a series of Acts which have had the effect of placing coal at least in the

hands of the National Coal Board—a typical State corporation of the now familiar model. It is very relevant, however, to observe the two successive steps, or rather series of steps, by which this result was achieved. Under the Coal Acts, 1938 to 1943, a body called the Coal Commission was created, and in that body became vested the fee simple in all " coal " and mines of " coal " and rights annexed thereto, together with certain rights to withdraw support, but subject to any servitudes, restrictive covenants, or other adverse matters affecting the property so vested, and subject also to the exclusion of certain leasehold and other interests, which were called " retained interests " (s. 5, 1938 Act). It is necessary to state here that " coal " was defined as including bituminous and cannel coal and anthracite (s. 3 (4) (a)); and when a lease subsisting on January 1, 1939, conferred the right to work and carry away both coal or anthracite and other minerals or substances, the other minerals or substances were included in the definition, subject to the right of the Coal Commission by direction to exclude them from the definition (s. 3 (4) (b)).

" Retained interests " (s. 5) included interests in coal or a mine of coal which arose under a coal-mining lease, including the interests of lessees a substantial part of whose business (though not coal mining) consisted in getting and carrying away minerals other than coal (1943 Act, s. 1); rights to work granted by a " working facilities order "; and interests in coal or a mine of coal in or under land formerly copyhold which were preserved to the tenant on enfranchisement except where the tenant had the right to work the coal without the licence of the lord and otherwise than by virtue of a coal-mining lease. And by virtue of section 34 of the 1938 Act there were excluded from the vesting the rights vested in statutory undertakers and others under the " Mining Code " provisions of the Railways Clauses Consolidation Act, the Waterworks Consolidation Act, and the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883, referred to above, and also any right vested in the Crown or in any local authority, highway authority or statutory undertaker, by any Act or order having effect under any Act, to prevent or restrict the working of coal.

It will thus be seen that a large number of proprietary and other interests in or rights over coal did *not* pass to the Coal Commission on the vesting date (July 1, 1942). There did, however, vest in the Commission, along with the coal or mine of coal all property and rights that would normally pass with them on a conveyance thereof (other than rights to withdraw support or rights vested by working facilities orders) subject to the limitations laid down in Part I of the Second Schedule to the 1938 Act. The most

important of these limitations on the effect of what has come to be known as the "statutory conveyance" is that which specifies that adverse servitudes over the surface are not to be deemed to have passed, either by virtue of section 62 of the Law of Property Act, 1925 (the "General Words" section) or as servitudes of necessity. Only existing easements annexed to the coal or mine of coal passed with them to the Commission—a point that is of no little significance in many cases.

The question of right to withdraw support is dealt with in Part II of the Second Schedule to the 1938 Act. Briefly—(1) If the ownership of the coal or mine was severed from that of the surface in fee simple or under a coal-mining lease, there vested in the Coal Commission a right to withdraw support similar in all respects to that formerly vested in the owner or lessee of the severed coal; but in the case of a coal-mining lease, the right was extended to the whole of the period during which the coal remained ungotten (cl. 5).

(2) If ownership of the coal or mine was NOT severed from that of the surface, there vested in the Commission a right to withdraw support so far as might be reasonably requisite for working coal, to the extent to which the existing owners were competent to grant the right, and subject to the payment of compensation for any damage caused *or* the making good (with the consent of the owner) of the damage.

The general effect of the Coal Industry Nationalisation Act, 1946, upon the ownership of mines and minerals was, in the first place, to transfer to the National Coal Board the interests of the Coal Commission (which was dissolved by the Coal Commission (Dissolution) Order, 1947); and in the second place, to vest in the new Board most of the interests in coal and mines and property of colliery concerns which were *not* formerly held by the Commission. The transfer of the Coal Commission's interests to the Board (so far as not specifically dealt with under section 5, *post*) was effected by section 38 of the Act; and the vesting of other interests principally by section 5 and the First Schedule of the Act; the vesting date in each case was January 1, 1947 (S. R. & O. 1946, No. 1986). The First Schedule is detailed and is concerned largely with colliery property generally, with which I am not here concerned. The First Part of the First Schedule deals with property that vested automatically in the Board (subject only to an order being made before January 1, 1948, with consent of the owner excluding the vesting—section 5 (8)), and this included:—

(a) interests in unworked coal and in mines of coal vested in colliery concerns or in the Coal Commission; and "retained interests" within the meaning of the Coal Act,

1938, EXCEPT interests of former copyhold tenants not having the right to work coal without the licence of the lord, and SUBJECT to the provisions of section 36 (which preserved rights of statutory undertakers and others to dig or carry away coal where necessary in the course of activities other than colliery activities); and

(b) interests of the Coal Commission in minerals *other* than coal, and interests of colliery concerns and of subsidiaries thereof in unworked minerals *other* than coal, being minerals which could only be economically worked in association with the working of coal or which could only be economically brought to the surface by the use of a mine of coal an interest in which vested in the Board.

The Minister of Fuel and Power had power to make regulations covering a number of points as to the vesting in the Board, and under this power (s. 5 (7)) he made Regulations (S. R. & O. 1946, No. 1674) which provided for the vesting of easements under certain conditions. The vesting comprised all such easements and other rights as would have passed under such a conveyance as is specified in the Schedule to the Regulations—generally speaking, this means a conveyance of the interests in unworked coal, mines of coal, minerals, fixed property or other land that vested in the Board by virtue of section 5 or the Third Schedule of the Act, carrying with it the rights that would pass normally on a common form conveyance of such property by virtue of section 62 of the Law of Property Act, 1925, subject to the restrictions and liabilities to which that property would normally be subjected—with the addition (1) of " advantages " enjoyed immediately before the vesting of the property in the Board over other land in the same occupation, which became easements or servitudes corresponding as nearly to those " advantages " as possible, and (2) of rights created by working facilities orders (paragraph 2 of the Regulations). There is a provision for settlement by arbitration of doubts and difficulties in connection with the vesting of such easements and rights.

It will be appreciated that the 1946 Act did therefore bring within the far-reaching net of the National Coal Board a handsome " catch " of coal and other minerals workable with coal, along with most of the rights that will normally be necessary for them to be worked. It should, however, be emphasised at once that the 1946 Act did NOT effect any severance of surface and mineral ownership, and it did NOT have any effect on rights of support. For these matters, one must continue to look to the common law and the Coal Acts, 1938–1943.

There have been three more Coal Industry Acts since 1946, of minor importance so far as the property lawyer is concerned, and those Acts, along with the "parent" Act of 1946, are referred to as "The Coal Industry Acts, 1946–51." More important to the property lawyer is the Coal Mining (Subsidence) Act, 1950, which to a very limited extent puts into force some of the recommendations of a committee appointed in July, 1947, to examine the law of support and problem of damage caused by mining subsidence in the light of the nationalisation of coal. The 1950 Act only deals with subsidence damage to small houses, and places the National Coal Board under an obligation to carry out reasonable repairs or to pay the reasonable cost of repairs to dwelling-houses of rateable value not exceeding £32 made necessary by subsidence damage occurring on or after January 1, 1947. Where cost of repairs would exceed the depreciation in value of the property, the Board's liability is confined to the amount of the depreciation. There is power to postpone permanent repairs where more damage is likely to recur, and, with consent, to execute works to prevent or mitigate damage. It is very much worthy of note that the rights accorded by the Act are alternative to any other rights—the person damaged must elect (section 14 of the Act).

So much for coal and the coal industry. It remains to consider some modern statutory provisions which deal with minerals other than coal. It will be remembered that at common law, gold and silver mines only were excepted from the general ownership of the land. To these must now be added petroleum. Under the Petroleum (Production) Act, 1934, the property in petroleum existing in its natural condition in strata in Great Britain was vested in the Crown and the Crown was given the exclusive right of searching and boring for and getting such petroleum. The Board of Trade (now the Minister of Fuel and Power—Ministers of the Crown (Minister of Fuel and Power) Order, 1942, and Minister of Fuel and Power Act, 1945) was given power to grant licences to search for and bore for petroleum, and Part I of the Mines (Working Facilities and Support) Act, 1923, was applied to the licensees.

Under the Atomic Energy Act, 1946, the Minister of Supply may do on or below the surface of land such work as is considered necessary to discover whether there are present any minerals from which can be obtained uranium, thorium, plutonium, neptunium or any compound thereof or any prescribed substances being such as may be used for the production of atomic energy. And he may compulsorily acquire such substances and any minerals from which such substances can be obtained (s. 8).

Finally, under the Mineral Workings Act, 1951, important provisions are made as to ironstone workings in the "Ironstone District" as defined (at present including the counties of Leicester, Lincoln (Parts of Kesteven), Lincoln (Parts of Lindsey), Northampton, Oxford, Rutland and Warwick and the Soke of Peterborough). The object of the Act is in general to provide for the restoration of land which has been used for ironstone working by setting up a fund comprising contributions from ironstone operators and owners, and Exchequer contributions. Payments are to be made by the Minister of Housing and Local Government out of this fund to operators carrying out restoration work, local authorities are given wide powers to do restoration works on worked ironstone land and to acquire land for the purpose, and the Minister of Agriculture and Fisheries is given powers of acquisition and of making arrangements for the management or farming of the land in order to bring it to a good state of cultivation and fertility. The Act does not affect the ownership of the ironstone itself—(though section 28 makes provision for certain modifications of ironstone leases)—or rights of support, and it is therefore referred to here chiefly because of certain sections of the Act which are of general application to all mineral owners (whether or not the minerals are within the "Ironstone District"). The writer does not wish to embroil himself in the controversy which exists as to whether planning questions are conveyancing matters or not; but it can hardly be denied that necessity for (or refusal of) permission to work minerals and liability to (or freedom from) development charge are everything to the mineral owner, who can hardly enjoy his property for aesthetic or practical reasons in its existing state, as a surface owner sometimes may. It seems therefore not out of place to add (as a footnote, if the reader wishes to consider it as such) that, whereas the Town and Country Planning Act, 1947, provided (s. 81) power for the Minister (meaning now the Minister of Housing and Local Government) with the consent of the Treasury to make regulations modifying that Act in its application to development consisting of the winning and working of minerals (under which provision regulations (S.I. 1948, No. 1521) were made amounting to a sort of three-year postponement of the application of the sections of that Act referring to development charges in the case of minerals vested in mineral workers on July 1, 1948), section 29 of the Mineral Workings Act, 1951, provides specifically that this power shall include power to make regulations securing that development charge in respect of prescribed minerals vested in mineral workers on July 1, 1948, shall be set off against payments falling to be made in respect of interests therein under

the Treasury Scheme to be made under section 58 of the 1947 Act (for "loss of development value"). (These regulations are contained in S.I. 2156 of 1951, known as the Mineral Development Charge Set-Off Regulations, 1951.) And even more directly relevant to the property lawyer, section 30 of the Mineral Workings Act, 1951, provides that the Lands Tribunal may on application by any party to a mining lease made *before* the appointed day (July 1, 1948) by order modify the provisions of the lease to secure, that in respect of any period after June 30, 1951, the lessee's payments shall not exceed such sums as would be fair and reasonable as between the parties if the lease had been granted *on* the appointed day, taking no account of any planning permission, granted or prospective, for development of the minerals. There are a number of consequential provisions, including (subsection (3)) a provision for recovery of sums paid by the lessee in respect of any period between June 30, 1951, and the date of the order in excess of the sums payable under the lease as modified by the order. Once again, one can only murmur resignedly "Caveat Lessor!"

THE IMPLIED SURRENDER OF LEASES

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One effect of the Court of Appeal's decision in the recent case of *Foster* v. *Robinson* (*a*) is to provide landlords with a means of obtaining vacant possession of their premises under circumstances in which they would normally be prevented from so doing by the presence of a statutory tenant. The facts of that case were that a bona fide arrangement was entered into in 1946 between a landlord and his tenant, who was also his servant, whereby the landlord declared the existing tenancy under which the tenant held to be at an end, but offered orally, in view of the latter's age and infirmity, to allow him to occupy the premises without paying rent for the rest of his days. The servant accepted this offer and continued to occupy the premises rent-free until his death a few years later. On these facts the Court of Appeal held that the arrangement of 1946 had effected a surrender of the tenancy by operation of law, with the logical consequence that on the tenant's death the landlord was entitled to possession of the premises as against the tenant's daughter who would, if the contractual tenancy had continued until her father's death, have been entitled to remain as a statutory tenant.

The undoubted importance of this decision to landlords in general merits an examination of the theoretical principles underlying it in order to ascertain precisely what conditions are required for an effective surrender of a lease or tenancy by operation of law. This it is proposed to do, but first the law relating to the express surrender of a lease must be stated briefly.

Express Surrender

At common law the surrender of a term might be effected by any words which showed the intention of the surrenderor to give up his estate, and that his estate should vest in the reversioner or remainderman (*b*). Further, before the Statute of Frauds, 1677, there might also be an express surrender by the abandonment of possession coupled with an intention to give up the term. (After

(*a*) [1951] 1 K.B. 149.
(*b*) Shep.Touch. 306.

the Statute of Frauds this was no longer possible since a deed or other writing was made requisite in every case of express surrender, but in order to uphold the surrender where there had been an agreement between landlord and tenant that the term should be put an end to, and this had been acted upon by a change of possession (*c*), it was classified, anomalously, as a surrender by operation of law (*d*).)

Section 3 of the Statute of Frauds, 1677, provided that no lease, etc., " either of freehold or term of years . . . shall be surrendered, unless it be by deed or note in writing, signed by the party surrendering the same, or their agents thereunto lawfully authorised by writing, or by act and operation of law." The Real Property Act, 1845, further provided that a surrender in writing was void unless made by deed, except in cases where the lease itself might have been created without deed. (Section 1 of the Statute of Frauds provided that a lease taking effect in possession for a term not exceeding three years at the best rent that could reasonably be obtained might be created by parol or in writing.)

The Statute of Frauds and Real Property Act, 1845, have in effect been re-enacted in this matter by the Law of Property Act, 1925, ss. 52–54 and the result seems to be as follows, though the matter is not entirely free from doubt: Every express surrender must be either by deed or in writing (sections 52 and 53). Leases not exceeding three years at the best rent, etc., may be surrendered by writing (section 53 (1); section 54 (2)). Such leases may be created by parol (section 54 (2)), but their surrender, if express, must be in writing. The surrender of all other terms, except by operation of law (section 52 (2) (c)), must be by deed (section 52). The surrender immediately divests the estate of the surrenderor, and vests it in the surrenderee, for it is a conveyance " to the perfection of which no other act is requisite, but the bare grant " (*e*) and thus no change of possession is required to complete it.

The position today is therefore stricter than at common law, since in the majority of cases a deed is necessary, whereas formerly a mere writing would suffice.

Surrender by Operation of Law

In a medieval land law dominated by technicality the surrender of leases, other than by express words, was probably founded on a

(*c*) There must be an acceptance of possession by the landlord, but this may be inferred from acts of ownership exercised by him after the tenant has quit the premises, as, for example, reletting the premises (*Nickells* v. *Atherstone*, 10 Q.B. 944; *Oastler* v. *Henderson*, 2 Q.B.D. 575).

(*d*) *Infra*; *Dodd* v. *Acklom*, 6 Man. & G. 672.

(*e*) *Thompson* v. *Leach* (1698) 2 Salk. 618.

technical rule and owed nothing to the intention of the parties. Thus at common law a surrender in law, as distinct from a surrender in deed, occurred in one case only, namely, where a lessee for life or years took a new estate from the reversioner which was incompatible with his present estate (*f*). This surrender did not rest upon the intention of the parties but was the construction of law on the situation of the parties in regard to their estate.

The enactment of the Statute of Frauds, however, and the interpretation which the courts put upon the particular clause dealing with the surrender of leases, introduced the element of intention, with consequent confusion. Since the words in section 3 "by act and operation of law" were construed as hitherto to mean surrender in law by the taking of a new lease (*g*), the enactment of the statute would seem prima facie not to have affected the common law rule in regard to this type of surrender at all, and directly it did not. Indirectly, however, it did, because the courts in their endeavour to effectuate the intention of the parties, and to prevent the statute from working hardship, concentrated their attention on what the parties either expressly or impliedly had intended, thereby allowing the basic principle, namely, that of incompatibility of estate, to become obscured.

The division in the Statute of Frauds was into express surrenders and surrenders by operation of law, and thus if the courts could not bring a surrender implied from the acts of the parties, and indeed any informal surrender, even express, within the term "surrender by act and operation of law," it would fail for want of a deed or other writing. In this way certain surrenders, which in fact depended on the intention of the parties, were classified as surrenders "by operation of law" in spite of the fact that the phrase ordinarily connotes an act or consequence independent of intention as, for example, the passing of property on intestacy or bankruptcy. The true nature of a surrender in law was emphasised by Parke B. in *Lyon* v. *Reed* (*h*) when the learned Baron said: "In such case it should be observed that there can be no question of intention. Thus in the cases . . . of a lessee taking a second lease from the lessor . . . it would not at all alter the case to show that there was no intention to surrender the particular estate, or even that there was an express intention to keep it unsurrendered," but unfortunately this clear statement of general principle has been lost from sight by the courts. Not only have they included within the term intentional surrenders, but in some cases have even

(*f*) Shep.Touch. 301.
(*g*) *Magennis* v. *Macullock*, Gilb.Rep. at 236.
(*h*) 13 M. & W. 285.

attempted to define the doctrine by reference to the parties' intention (*i*). Thus Brady C.B. declared in one case (*k*) "a surrender by act and operation of law, I think, may properly be stated to be a surrender effected by the construction put by the courts on the act of the parties, in order to give to those acts the effect substantially intended by them." It is also interesting to find in a note to *Cannan* v. *Hartley* (*l*) the comment that "the courts, more and more unwilling to frustrate the intentions of the parties by a strict adherence to the Statute of Frauds," had treated in some cases an informal act done *ipsissimo animo sursumreddendi* as a surrender by act and operation of law—a construction tending to make the exception nearly co-extensive with the enactment.

This confusion has been carried over into the modern law, and may be found inter alia (*m*) in the definition of a surrender by operation of law contained in Foa's General Law of Landlord and Tenant (*n*) which was approved by the Court of Appeal in *Foster* v. *Robinson*, *supra*. The definition requires first "an act of purported surrender" invalid because informal, and secondly "some change of circumstances supervening on or arising from the purported surrender which, by reason of the doctrine of estoppel or part performance, makes it inequitable and fraudulent for any of the parties to rely upon the invalidity of the purported surrender."

Thus in seeking to do justice between the parties the courts have, first, expanded the meaning of the phrase "by operation of law" so as to render it uncertain and well-nigh meaningless; secondly, have lost sight of the true basic principle underlying surrender by operation of law; and thirdly, have replaced it by the doctrine of estoppel or (perhaps) that of part performance. As a result, the law on this subject has become confused and difficult.

Estoppel

It is clear that the particular form of estoppel taken by the courts in their application of the doctrine to the surrender of leases is that of estoppel in pais, or by conduct (*o*). There would seem, however, to be at least two distinct though similar modes of conduct which may raise such an estoppel, namely, representation and what may be called acknowledgment, and it is proposed therefore to

(*i*) See, *e.g.*, *Phené* v. *Popplewell*, 12 C.B. (N.S.) at 341, *per* Willes J.: "The intention of the parties is to be made out by the circumstances."

(*k*) *Lynch* v. *Lynch*, 6 Ir.L.R. 131.

(*l*) 9 C.B. 634.

(*m*) See, *e.g.*, Halsbury, Laws of England, 2nd ed., Vol. 20, p. 269, note (*s*).

(*n*) (7th ed.) pp. 617–618.

(*o*) See, *e.g.*, *Wallis* v. *Hands* [1893] 2 Ch. 75.

examine each of these in their relation to the law of surrender by operation of law.

Estoppel by Representation

Two learned authors have said of estoppel (*p*) : " Few doctrines are at once so potentially fruitful and so practically unsatisfying. It is more often cited than applied, and more often applied than understood." But in spite of its difficulty, it is contended that certain well-defined requirements for the operation of a true estoppel by representation emerge from the cases, which are :

1. There must be an untrue representation of an existing fact, not of mere intention (*q*).

2. The representation must be clear and unambiguous (Co. Litt. 352a " Estoppels must be certain to every intent ").

3. The representation must either be false to the knowledge of the representor or be intended by the representor to be acted on in the manner in which it is acted on (*r*).

4. The representation must have been acted upon as true by the party to whom it was made (*s*).

5. In acting upon the representation the party to whom it was made must have altered his position to his prejudice (*t*).

Since the untrue representation must be acted upon as true by the person to whom it is made, that person *ex hypothesi* must be ignorant of the true facts of the situation. It follows that if the representee knows what the true facts are, there can be no room for the operation of this type of estoppel, and the position would seem to be *a fortiori* when all the parties are aware all the time of all the relevant facts (*u*).

" If two people with the same source of information assert the same truth, or agree to assert the same falsehood at the same time, I cannot see how either can be estopped as against the other from asserting differently at a later time. . . ." (*x*).

The main difficulty in applying the doctrine of estoppel to the surrender cases is to find any situation which could give rise to a true estoppel by representation in the strict sense because, since the problem is concerned with the legal effect of any given set of

(*p*) See *Cheshire and Fifoot* in 63 L.Q.R. 283.

(*q*) *Jorden* v. *Money* (1854) 5 H.L.Cas. 185.

(*r*) *Freeman* v. *Cooke* (1848) 2 Exch. 654 at 663.

(*s*) *Freeman* v. *Cooke*, *supra*.

(*t*) *Greenwood* v. *Martin's Bank* [1933] A.C. at 57, *per* Lord Tomlin; *Canadian & Dominion Sugar Co., Ltd.* v. *Canadian National Steamships, Ltd.* [1947] A.C. at 56, *per* Lord Wright.

(*u*) See *Re a Bankruptcy Notice* [1924] 2 Ch. 76.

(*x*) *Per* Langton J. in *Square* v. *Square* [1935] P. 120 at 126.

facts, which are generally not in dispute, any representation, to be relevant, must be as to the legal effect of those facts. And this is a question of law.

In *Fenner* v. *Blake* (*y*) a yearly tenant orally agreed with his landlord to surrender his tenancy at an earlier date than that on which it could be determined by notice to quit. The landlord, to the knowledge of his tenant, sold the premises to a purchaser with vacant possession at the earlier date. The transaction was construed by the court as an acceptance by the tenant of a new oral tenancy expiring on the date agreed for possession, from which it followed that his previous tenancy was surrendered by operation of law. (The case was treated as one of surrender by operation of law, notwithstanding the agreement to surrender.) Judgment was therefore given for the landlord in an action of ejectment, on two grounds: first, apparently, the inconsistency of estate; secondly, on the ground of estoppel. This latter ground gives rise to at least four difficulties. First, all the facts were known to both parties. Secondly, on what representation by the tenant did the landlord act? The tenant had done nothing, so far as his landlord was concerned, except make an agreement which was not binding by reason of the Statute of Frauds, and permit his landlord to act on it as if it were binding. Thirdly, the only representation which can be ascribed to the tenant is that the interest possessed by him was one which merely extended to the agreed date, which would seem to be a question of law rather than fact. Fourthly, it seems more likely that the representation (if any) was not one as to an existing fact at all, but a mere future promise (to give up possession at the agreed date).

A similar estoppel was held to exist, notwithstanding, in *Metcalfe* v. *Boyce* (*z*). It was agreed in 1912 that the chief constable should become the tenant of certain houses occupied by police constables as quarterly tenants, and that the constables should continue to occupy as servants of the chief constable. The defendant, a police constable, accepted this arrangement and from 1912 onwards rent was paid by the county police authority on behalf of the chief constable whilst the defendant continued to occupy. It was held that the defendant's original tenancy was thereby surrendered by operation of law on the ground of estoppel, but again it may be said that there was no untrue representation of fact necessary to bring the doctrine of estoppel into operation, and that all parties were in possession of all the facts of the situation.

(*y*) [1900] 1 Q.B. 426.
(*z*) [1927] 1 K.B. 758.

Finally in *Foster* v. *Robinson* (*a*) the tenant's daughter was held to be "estopped" from denying the surrender, apparently in view of the fact that her father had acted consistently with the terms of the informal agreement of 1946. All the parties, however, were aware of the facts, which indeed were not in dispute, the issue being solely as to the legal effect of those facts. The only representation which the tenant by his continuing in occupation rent-free could be said to have made, was that he had abided by the 1946 agreement, one of the terms of which was that he should give up his tenancy. This would seem to be irrelevant to the doctrine of surrender by operation of law, however, and would turn *Foster* v. *Robinson* into a case of express surrender. Since there was no writing, nor (probably) any act of part performance (*b*), such informal express surrender could not have been enforced by the landlord. The Court of Appeal, however, proceeded on the footing that the case was one of surrender by operation of law, and it is submitted that on this hypothesis there was no representation by the tenant sufficient to raise an estoppel.

Estoppel by Acknowledgment

This form of estoppel seems to be an extension of the legal principle *allegans contraria non est audiendus* by which a person is prevented from "blowing hot and cold," and arises to prevent a person from denying that which he has previously acknowledged. A common instance is the case of a tenant, bailee or licensee who is estopped from denying his landlord's, bailor's or licensor's title.

So far as the cases of surrender by operation of law are concerned the function of the doctrine of estoppel is generally to prevent a tenant who has accepted a new lease during the continuance of an existing lease, or who has given up possession to a new tenant to whom the landlord with his consent has granted a lease, from denying the landlord's right to grant such lease. Since the landlord would only be in a position to grant the new interest if the old one was surrendered, it follows that the tenant is estopped from denying that a surrender has occurred.

It is submitted that this is much more like an estoppel by acknowledgment than by representation (which, as has been seen, cannot really meet the case of surrender) and that in fact it is this form of estoppel which is said to be the principle underlying surrenders by operation of law.

(*a*) *Supra.*
(*b*) See *infra.*

However, in applying the doctrine, there is a further difficulty of defining what kind of acts are sufficient to raise an estoppel.

The legal doctrine of estoppel in pais had a very confined operation until the beginning of the nineteenth century, and the number of acts which could give rise to an estoppel was limited, being listed by Coke as "by liverie, by entry, by acceptance of rent, by partition, and by an acceptance of an estate" (*c*). These acts were taken to be no less formal and solemn than the execution of a deed. The common denominator was notoriety which was necessary to enable the court to ascertain without difficulty whether in fact a person had or had not concurred in an act of this sort so as to raise an estoppel against him. Thus in two early cases (*d*) where there was a delivery of possession by the tenant to his landlord, the change of possession constituted the notorious act.

But in *Thomas* v. *Cook* (*e*), where it seems the doctrine was applied in such a case for the first time, a new lease made with the assent of the lessee to a third person whom the lessee had previously let into possession was held to effect a surrender by operation of law.

In the later case of *Lyon* v. *Reed* (*f*), the correctness of this decision was questioned by the Court of Exchequer, which held in a careful and elaborate judgment delivered by Parke B. that the delivery up of his lease by a lessee after the grant of a new lease to a third person with his assent did not work a surrender by operation of law on the ground that the acts of delivery up and assent were not included in that class of acts in pais which bind parties by way of estoppel, and therefore were not sufficiently notorious and unequivocal.

The reasoning in *Lyon* v. *Reed* was approved in *Creagh* v. *Blood* (3 Jo. & Lat. 133) where the Lord Chancellor pointed to the danger inherent in *Thomas* v. *Cook* that a person in possession under a lease might have his estate divested merely by standing by whilst his landlord with his knowledge granted the land to another, without being a party to the deed and without having given up possession.

The requirement of some act of notoriety was reiterated by Chitty J. some 50 years later (*g*) in a case where the lessee assented orally to the grant of a new lease to third parties. It was held that this was not sufficient to take the case out of the operation

(*c*) Co.Litt. 352a.
(*d*) *Dodd* v. *Acklom*, 6 Man. & G. 672; *Grimman* v. *Legge*, 8 B. & C. 324.
(*e*) 2 Stark. 408; 2 B. & Ald. 119.
(*f*) 13 M. & W. 285.
(*g*) *Wallis* v. *Hands* [1893] 2 Ch. 75.

of section 3 of the Statute of Frauds, and that there can be no surrender by operation of law unless the old tenant gives up possession to the new tenant at or about the time of the grant of the new lease. The learned judge was of opinion that the controversy between *Thomas* v. *Cook* and *Lyon* v. *Reed* had been settled by the Court of Exchequer in *Davison* v. *Gent* (*h*) where it was stated as an established rule that there must be a giving up of possession by the old tenant to effect a surrender by operation of law.

In the more recent cases, however, this requirement of notoriety in the form of a physical change of possession has not been pressed. In *Fenner* v. *Blake*, there was no change of possession at all, and in *Metcalfe* v. *Boyce* and *Foster* v. *Robinson* it was constructive only, though in all three cases an effective estoppel was held to exist.

A factor which may have contributed to this requirement of a physical change of possession was that before 1926, in order to obtain the full legal benefit of the lease, the lessee had to perfect his title by entry, until which time he had no estate in the land, but merely an *interesse termini*. Thus where the lessor had granted a new lease to a third party, until that third party entered into possession he could not raise his title against the lessee, and the question whether there had been a surrender would generally not arise.

The doctrine of *interesse termini* has now been abolished (*i*) and since January 1, 1926, all terms of years absolute are capable of taking effect at law or in equity from the date fixed for the commencement of the term without entry.

Next a word will be said on the application of the alternative principle upon which surrenders by operation of law are said to be based, namely, the doctrine of part performance.

Part Performance

Under the equitable doctrine of part performance an informal agreement which is unenforceable at law for want of writing or other formality may be enforced in equity provided that value is given and that there is a sufficient act of part performance by the party seeking to enforce the agreement.

It must be said at once that although the doctrine has been described as one of the alternative principles underlying the law of surrender by operation of law (*k*), the writer has not been able

(*h*) 1 H. & N. 744.
(*i*) L. P. A., 1925, s. 149 (i).
(*k*) Foa's General Law of Landlord and Tenant (7th ed.), pp. 617–618.

to find any case in which it has been taken as such, though in at least one case it was argued, but not referred to in judgment (*l*).

By section 3 of the Statute of Frauds a surrender by operation of law is expressly exempted from the requirement of a deed or other writing. It follows that if the doctrine of part performance is to be relevant in this connection, its function will be, not to render enforceable an express agreement which lacks certain formalities required by law, but to enable one kind of informal surrender to be construed under certain conditions as another kind of informal surrender, namely, a surrender by operation of law, in order to give it validity.

It is felt, however, that a surrender by operation of law, being the construction of law upon the acts of the parties by its very nature does not admit of the application of the doctrine of part performance. It is a condition precedent to the operation of that equitable doctrine that there should be an express contract or agreement which can be specifically enforced (*m*), and in pursuance of which the acts of part performance are done. In the case of a surrender by operation of law there should *ex hypothesi* be no contract or agreement to surrender, for if there were it would be a case of express surrender. An agreement may no doubt be entered into, but this will be merely one of the acts of the parties upon which the construction of law is placed, and thus of no special significance.

The fact that in *Foster* v. *Robinson*, *supra*, an informal agreement was entered into, one of the terms of which was that the tenancy was to be surrendered, would seem to suggest that that case was in fact one of express surrender. It was not treated as such by the Court of Appeal, however, and for the purpose of this article it has been regarded as a true case of surrender by operation of law. It may be noticed however that if, in fact, it had been a case of express surrender, it would have been extremely difficult to apply the doctrine of part performance so as to make good the formal deficiency. The landlord was relying on the surrender and the onus would have been on him therefore to show a sufficient act of part performance (*n*). All that he had done, however, was to refrain from demanding rent whilst allowing the tenant to remain in occupation—a negative course of conduct which though significant might reasonably have been explained apart from the informal agreement of 1946. There would seem to be no objection in

(*l*) *Metcalfe* v. *Boyce*, *supra*.
(*m*) *Manchester Brewery Co.* v. *Coombs* [1901] 2 Ch. 608 at 617.
(*n*) *Caton* v. *Caton* (1866) L.R. 1 Ch.App. 137.

principle to a negative act constituting a valid act of part performance, provided it is exclusively referable to some contract which is consistent with that set up, but here, it is submitted, such was not the case.

In view of the intrinsic nature of a surrender by operation of law, it would seem then that the doctrine of part performance was never intended to, and cannot strictly, apply to the type of situation in which such a surrender operates.

Conclusion

Lord Justice Denning in a recent article (*o*) has expressed the view that the decision in *Foster* v. *Robinson* was based on the *High Trees Case* principle, or the doctrine of quasi-estoppel, as it is sometimes called. The learned author admitted, however, that the case was " undoubtedly complicated by the question of surrender " and it is desirable to emphasise that it is not the surrender aspect of the case which is directly concerned with that principle. It must not be thought that a doctrine so old as that of surrender by operation of law is based on a principle so new as that of the *High Trees Case*.

In *Foster* v. *Robinson* the Court of Appeal held that the agreement of 1946 had conferred on the tenant an irrevocable licence. The question of quasi-estoppel, if relevant to the case, extended only to the irrevocable nature of the licence. Lord Justice Denning has argued that without the *High Trees Case* principle the licence would not have been irrevocable, since there was no consideration moving from the promisee to the landlord. The tenant's past services were a past consideration, and the fact that the landlord was to obtain vacant possession of the premises on the tenant's death could not be taken as consideration since this itself depended on a valid surrender of the contractual term.

The doctrine of quasi-estoppel, however, does not extend to the question of surrender. Having established that the licence was irrevocable, the further question arises, did that fact bring about a surrender of the tenancy, and if so, on what principle? The Court of Appeal held that it did, on the principle of estoppel. A solution however which would at once restore the pristine clarity of the common law and cut through the doctrines of estoppel and part performance, which have contributed so much to the difficulty of this subject, would be to show that the tenant as a result of the agreement of 1946 acquired an interest which was inconsistent with his former tenancy. Such a solution leads inevitably to the proposition

(*o*) 15 M.L.R. 1.

that an irrevocable licence may confer on the licensee some interest in the land. Although this is a somewhat novel view it is suggested tentatively that there is some ground for putting it forward at the present time and moreover that it is difficult to support *Foster* v. *Robinson* on any other hypothesis (*p*). In other words, it may be that, though formerly a licence of this kind could not be regarded as conferring an interest in land, nevertheless, since the Judicature Act, 1873, *Hurst's Case* (*q*), and especially the *Millennium Productions Case* (*r*), such licence may confer, at least as between the contracting parties, a sufficient inconsistent interest to effect a surrender by operation of law. A licence on the other hand would seem not to create an interest in land, in the sense of a right *in rem* against the whole world and apparently does not fall within section 53 of the Law of Property Act, 1925, which requires that interests in land shall be created by writing. It may be added that there would seem to be no question of the registration of licences so as to bind third parties (*s*).

The view that a licence may now confer some interest in the land has, it is submitted, been strengthened by a recent decision (*t*) of the Court of Appeal, where it was said that, since the fusion of law and equity, contractual licences now have a force and validity of their own, and cannot be revoked in breach of the contract. Neither the licensor nor anyone who claims through him (except a purchaser for value (*u*)) can disregard the contract. In addition, it is now clear that a licence may confer exclusive possession of the premises on the licensee (*t*).

In conclusion, it is perhaps not without interest to recall that the twin doctrine of merger also began life as a technical common law doctrine. In that case, however, there grew up side by side with the common law rule an equitable doctrine of merger based on intention which was ultimately recognised by the Judicature Act, 1873 (*x*), and became predominant.

The technical rule of surrender was never supplemented in this way by any comparable, recognised equitable doctrine, and the position to that extent has remained unaffected by statute. The solution outlined above, which is consistent with all the cases on

(*p*) See 15 M.L.R. at 7, where Lord Justice Denning says: "[The landlord's promise] being binding on him, it created a licence which was inconsistent with the continuance of the tenancy."

(*q*) [1915] 1 K.B. 1.

(*r*) [1947] 2 A.E.R. 331.

(*s*) Conveyancer, Vol. 11, 165.

(*t*) *Errington* v. *Errington* [1952] 1 A.E.R. 149.

(*u*) The plaintiff in *Errington* v. *Errington* was the devisee of the licensor's land.

(*x*) s. 25 (4); now L. P. A., 1925, s. 185.

surrender by operation of law decided in this century, would enable the law to be brought back on to its original course free from such disturbing influences as estoppel and part performance. At the same time, it may be that the courts, consciously or unconsciously, are even now seeking in some measure to assimilate the law of surrender to that of merger by replacing the old technical rule with a new equitable rule based on intention. That this is not an inevitable process however has been shown by the fact that the Court of Appeal in recent years has refused to mitigate the analogous technical rule that a sub-lease of the whole of the remainder of a term contained in a head-lease operates as an assignment of the head-lease by operation of law (*y*).

(*y*) *Milmo* v. *Carreras* [1946] 1 K.B. 306.

CORRESPONDENCE

Dear Sir,

It is not often that criminal proceedings are relevant to the matters dealt with in your Journal but I would like to draw your attention to the case of Edward Johnson-Noad, who was recently sentenced on numerous charges of false pretences and fraudulent conversion. It was alleged that he purported to let the same flat to 17 different people who each paid to him large sums as deposits, and I have been informed of another similar case where a person purported to let a flat to about 40 different persons who also paid large sums as deposits, and who has now fled from the country.

It appears that in view of the present great need to obtain accommodation people are required to accept immediately an offer to let the premises before they are able to consult their solicitor, for fear lest somebody else will accept the offer in the meantime. When they consult him afterwards about the terms of the lease he finds that in view of section 44 of the Law of Property Act, 1925, he is unable to ascertain if the purported lessor has a title. I can sympathise with the view of one of the victims who told me that, as his solicitor had not discovered that the purported lessor had no title, the solicitor was obtaining money under false pretences.

These two cases prove that your comments on p. 117 of Vol. 3 that the provisions of this section are unreasonable and unsatisfactory were completely justified.

As there has been promised further legislation concerning leasehold law it may be possible for this position to be rectified.

Yours faithfully,

Robert M. Brodtman.

24, Sackville Street,
London, W.1.
April 30, 1952.

NOTES OF RECENT CASES

1. *LAW OF PROPERTY AND CONVEYANCING*

By S. M. Tolson, Barrister-at-Law

Easement—use of land for benefit of business.—An interesting point arose before Upjohn J. in *Copeland* v. *Greenhalf* [1952] 1 All E.R. 809, namely, whether an easement must be for the benefit of land and not merely for the benefit of some business carried on upon the land.

The defendant and his father had carried on business as wheelwrights for over 50 years in a workshop adjoining a highway. On the opposite side of the highway was a long strip of land on which, during the whole period, the defendant and his father had left vehicles and other articles before and after repair. They always left a passage clear to provide access from the road to an orchard which lay behind the strip. The plaintiff, the owner in fee simple of the orchard and the strip, then sought an injunction to restrain the defendant from using the strip, and the defendant contended that he had acquired an easement to use it under the Prescription Act, 1832.

The learned judge found for the plaintiff on the ground that no right as wide and undefined as that the defendant claimed could be the subject-matter of an easement. It was virtually a claim to possession or at any rate to joint user. His Lordship referred, inter alia, to *Hill* v. *Tupper* (1863) 2 H. & C. 121, and *Dyce* v. *Hay* (1852) 1 Macq. 305.

Upjohn J. said, however, that it was irrelevant that the alleged easement was only for the benefit of the defendant's business. This point had been concluded in *Moody* v. *Steggles* (1879) 12 Ch.D. 261, and was confirmed by the opinion of the Judicial Committee in *Att.-Gen. of Southern Nigeria* v. *John Holt & Co. (Liverpool), Ltd.* [1915] A.C. 599, *per* Lord Dunfermline at p. 617. In the former case Fry J. said at p. 266 that any argument to the contrary was of too refined a nature to prevail, because, " a house can only be used by an occupant, and the occupant only uses the house for the business which he pursues, and therefore, in some manner (direct or indirect) an easement is more or less connected with the mode in which the occupant of the house uses it."

Contract for sale—compulsory purchase order—frustration.—As Vaisey J. observed in *Hillingdon Estates Co.* v. *Stonefield Estates, Ltd.* [1952] 1 All E.R. 853, it is surprising that hitherto the effect of a compulsory purchase order on a contract for sale of land has not been judicially dealt with.

In 1938 the plaintiffs agreed to purchase from the defendants certain property in fee simple. Completion was postponed owing to the war and in 1948 a compulsory purchase order was made affecting the whole of the property. Notices to treat were served on both parties in the following year, and the plaintiffs claimed they were discharged from their contract.

The learned judge having noted that between contract and completion it is the purchaser who is the owner of the land in equity subject to the payment of the purchase money, thought that it was the purchaser as such owner who was the notional party to the notional contract formed by the notice to treat. While the compulsory purchase order had very much altered the situation, he could not appreciate that it had been " altered in such a fundamental and catastrophic manner as to justify the court in saying that the whole contract had been frustrated." Having discussed the doctrine of frustration, he pointed out that the purchasers were in no worse position than they would have been had they completed 12 years earlier as was originally agreed, and that the contract could and should still be carried out subject to the notice to treat.

The plaintiffs had in their contract agreed to enter into certain restrictive covenants, and the learned judge thought that the property would have to be conveyed subject to them, though he purposely did not express any opinion as to how far anyone in the future would have a right to enforce them.

Power of appointment—fraudulent exercise.—In *Re Simpson's Marriage Settlement* [1952] 1 All E.R. 963, the testator was given power under his marriage settlement to appoint the trust funds in favour of his children or remoter issue, and in default of appointment, the funds were to be held on trust for those children who attained 21 in equal shares. By his will the testator directed that his residuary estate should be held on trust for each child who survived him in equal shares, and he then settled the share of each child. He then purported to exercise his power of appointment in favour of each child who survived him in equal shares, provided that no such child should be entitled to a share of his residue unless they settled the appointed property upon the same trusts as those declared with regard to their share in the residuary estate. One of the children, who had attained 21, died before the testator.

Vaisey J. held:

(1) that there had been a fraudulent exercise of the power of appointment which was therefore void, and that the trust funds should be held as on default of appointment:

(2) that the direction to settle the appointed share was valid and binding on the share received in default of appointment:

(3) and that if all the surviving children refused to settle their share of the trust funds, the testator's residuary estate would be held as on intestacy.

Referring to the first point, the learned judge thought that this case was covered by the dictum of Farwell J. in *Re Neave* [1938] Ch. 793, at p. 797, and by *King* v. *King* (1864) 15 I.Ch.R. 479, which

showed that a principle of quasi-election might apply to a scheme of this sort. However, turning to the doctrine of equitable fraud, he said that much greater emphasis had been laid upon it in recent years than in 1864, and having referred to *Vatcher* v. *Paull* [1915] A.C. 372, and *Re Crawshay* [1948] A.C. 123, he summed up the doctrine by saying, " an appointment will be held to be fraudulent if it is executed with a view to furthering some object which the appointor had in view and not with the sole object of benefiting the appointee who is or may be the object of the power." He thought the testator had been determined as far as possible to treat the settled property as his own, and therefore he held that the exercise of the power was void and that the trust funds should be held as on default of appointment.

Forfeiture clause—trading with the enemy.—Fraenkel v. *Whitty* [1948] Ch. 55, a case concerning the effect of the Trading with the Enemy Act, 1939, and orders made thereunder, on a forfeiture clause contained in a settlement, has been overruled by the Court of Appeal in *Re Pozot's Settlement Trusts* [1952] 1 All E.R. 1107, where substantially identical words were used.

The protected life interest under the settlement was to cease if the income " became vested in or charged in favour of some (other) person," and, as Evershed M.R. said, the whole question turned on the significance of the two words " vested in." The court agreed that the words meant " vested in proprietary interest in some person," and they then considered whether the Trading with the Enemy Act and orders had caused the interest to become so vested in the custodian.

The court found that in section 7 of the Trading with the Enemy Act, 1939, and the Board of Trade's direction upon that section contained in the Trading with the Enemy (Custodian) Order, 1939, Art. 1, the clearest distinction was drawn between the vesting of property in the custodian on the one hand, and the payment of moneys to him (as in the present case) on the other. Evershed M.R. said: " Recent legislation has after all made us familiar with the distinction . . . between the position of those who are given statutory rights, having no proprietary interest, and those who have proprietary interests conferring privileges which are for practical purposes no different from the statutory rights," and he gave as instances the statutory tenant and the Minister who requisitions property.

The learned Master of the Rolls explained that under the legislation in question the custodian had the right to demand the payment to him of the income arising under the protected life interest as it fell due, not because some proprietary interest under the settlement was vested in him, but on the contrary, because the proprietary interest, the life estate, was vested not in him but in an enemy under the legislation.

It was held, therefore, that the protected life interest had not determined, though it was emphasised by Jenkins L.J. that this decision turned on the true construction of the settlement, and that there might well be clauses so worded that the effect of the Trading with the Enemy Act, 1939, would bring about a forfeiture [he referred to *Re*

Gourju's Will Trusts [1943] Ch. 24, and *Re Hall* [1944] Ch. 46], indeed, he thought the result of the present case would inevitably have been different had the clause contained the words " or payable to."

Public trusts—not for benefit of individuals—uncertainty of objects—void.—In *Re Astor's Settlement Trusts* (see note, CHARITIES, *post*, p. 222) [1952] 1 All E.R. 1067, Roxburgh J. applied the dictum of Lord Parker of Waddington in *Bowman* v. *Secular Society* [1917] A.C. at p. 441, that " a trust to be valid must be for the benefit of individuals . . . or must be in that class of gifts . . . which the courts recognise as charitable. . . ." The learned judge pointed out that if it were otherwise, a class of trusts would be created which no one could enforce, control or reform.

He explained that the cases showing the contrary, such as *Pettingall* v. *Pettingall* (1842) 11 L.J.Ch. 176, and *Re Dean* (1889) 41 Ch.D. 552, were anomalous and exceptional. They were matters arising under wills and intimately connected with the deceased, dealing with animals, graves and monuments, where the court found an escape from the general propositions by means of the residuary legatees, who could enforce the purposes indicated or claim the property themselves. These cases, which Sir Arthur Underhill has suggested may be concessions to human weakness or sentiment, cannot of themselves, Roxburgh J. concluded, justify the conclusion that a court of equity would recognise as an equitable obligation, affecting the income of large funds in the hands of trustees, a direction to apply it in the furtherance of enumerated non-charitable purposes in a manner which no court or department can enforce. The trusts were therefore void as being for the benefit of individuals and also void for uncertainty.

Condition subsequent—" discontinue ".—In *Re Wood's Will Trusts* [1952] 1 All E.R. 740, a testator provided in a name and arms clause that the beneficiaries' interest should cease if he should " discontinue to bear and use " the name and arms in question.

Vaisey J.'s doubts in *Re Bouverie* [1952] 1 All E.R. 408 (see *ante*, p. 131) on the validity of these words were confirmed in the present case by Wynn-Parry J., who held that the clause was void for uncertainty. The learned judge was asked to distinguish *Re Bouverie* (*supra*) on the ground of the difference between the words under consideration, but found himself unable to do so. He was similarly unable to hold that Vaisey J. had not applied the correct test for deciding such questions of uncertainty (see *Bromley* v. *Tryon* [1951] 2 All E.R. 1058, *per* Lord Simonds L.C. at p. 1064) or that Vaisey J. had not considered the long and respectable ancestry of that particular condition in well-known precedents.

It is obvious from these cases that the drafting of name and arms clauses will need special reconsideration until the full effect upon them of the decisions in *Sifton* v. *Sifton* [1938] A.C. 656, and *Clayton* v. *Ramsden* [1943] A.C. 320 have been more fully explored.

Licence to occupy premises—exclusive possession.— *Cobb* v. *Lane* [1952] 1 All E.R. 1199 was a case very similar to *Errington* v. *Errington* [1952] 1 All E.R. 149 (see note, *ante*, p. 54), and for similar reasons the Court of Appeal held that a mere licence had been given to live in the premises and not a tenancy at will.

There had been a family arrangement whereby a house was bought in the name of an elder sister who allowed her brother to live in it. He lived there for more than 13 years, the sister paying the rates, but when the sister died, she left the house to other people. When the sister's executors sought possession, the brother met their claim by saying that he was a tenant at will who had acquired a squatter's title under the Limitation Act, 1939, having been in possession for more than 13 years.

The court held, applying the dictum of Lord Greene M.R. in *Booker* v. *Palmer* [1942] 2 All E.R. at p. 677, that the question was one of intention, and that here the intention was that the brother should have a personal privilege with no interest in the land, and accordingly could not acquire a title under the Limitation Act, 1939. The court again emphasised that exclusive possession is not a test negativing the possibility of the occupier being a licensee.

Transfer of local authority's interests under National Health Service Act, 1946, *s.* 6 (2)—*Interests held by private person.*— In *Ministry of Health* v. *Stafford Corporation* [1952] 1 All E.R. 744, a hospital board had before the appointed day operative under the National Health Service Act, 1946, held a leasehold interest in property which was being used by them as an isolation hospital, subject to which the fee simple in the property was vested in the defendant corporation. The question then arose as to whether under section 6 (2) of the Act the fee simple vested in the Minister of Health as well as the leasehold interest in the property.

Danckwerts J. found that the defendant corporation was within the definition of a local authority contained in section 79 (1) of the Act, but then noted that the draftsman of the Act had not contemplated in section 6 (2) that such hospitals as came within that subsection might not be vested solely in the local authority, and that a private citizen might also have some interest in the land. The learned judge could not believe that it was the intention of the subsection to deprive a citizen of his property without compensation, and he therefore construed the subsection as covering only activities and interests which were vested in a local authority. Although the fee simple could be used by the defendant corporation for any purpose for which it could legally acquire land, the learned judge felt that he must apply section 6 (2) literally, and (with the assistance of the Interpretation Act that the singular in statutes includes the plural) he held that any interests in land used for the revelant purposes on the appointed day vested in any local authority were transferred to the Minister of Health.

Order for possession against occupier of mortgaged property.—In *Alliance Building Society* v. *Shave* [1952] 1 All E.R. 1033, a charge by way of legal mortgage provided that the statutory power of sale should be exercisable free from the restrictions imposed by section 103 of Law of Property Act, 1925 (*i.e.*, at any time without demand for the mortgage money, and without breach of covenant). As the instalments of capital and interest had fallen into arrear, the mortgagees wished to take possession of the premises. The two mortgagors had left the premises which were occupied by one B. The mortgagees by an originating summons under R.S.C., Ord. 55, r. 5A, sought an order for possession even though neither of the mortgagors had been joined.

Wynn-Parry J. held (1) that although Roxburgh J. in *Martin's Bank* v. *Kavanagh* [1948] 2 All E.R. 448, had held that the mortgagor was a necessary party because of the form of the order prescribed by Ord. 55, r. 5A (see Annual Practice, 1949, Vol. 2, at p. 2759) Evershed M.R. in *Alliance Building Society* v. *Varma* [1949] 2 All E.R. at p. 263, said that, notwithstanding the form of the order, it could be made against a stranger in title and no order need be made against the mortgagor if he was not in occupation of the mortgaged property.

(2) The learned judge also distinguished *Martin's Bank* v. *Kavanagh* (*supra*) on the ground that there was no prejudice to the person entitled to the equity of redemption in the present case. In view of the exclusion of the provisions of section 103, L. P. A., 1925, the learned judge could not discover any circumstances which could possibly prejudice the mortgagors if the order was made as requested.

Injury to fishery—nuisance and trespass.—In *Pride of Derby and Derbyshire Angling Association, Ltd., and Earl of Harrington* v. *British Celanese, Ltd.* [1952] 1 All E.R. 1326, Harman J. found that, the first defendant having admitted liability, the second and third defendants had contributed to the pollution of the river Derwent, and that the plaintiffs, the riparian owners and owners of fishing rights lower down the river were entitled to damages and injunctions against all the defendants.

The learned judge applied *Blair* v. *Deakin* (1877) 57 L.T. 522, and *Thorpe* v. *Brumfitt* (1873) 8 Ch.App. 650, and held that where the wrong of one defendant was big enough to be an actionable nuisance by itself, the law would not relieve other defendants who have also contributed to the nuisance, any more than it will relieve any number of defendants none of whom individually have committed an actionable nuisance.

Chose in Action.—In *Re an Application by Marly Laboratories, Ltd.* [1952] 1 All E.R. 1057, the Court of Appeal held that the right of a party to an action to make an application to the judge for an order for costs was not a chose in action, and therefore could not be assigned under section 136 (1) of the Law of Property Act, 1925.

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2. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

Purpose trusts—unenforceable unless charitable—consideration of "animal cases."—Re Astor's Settlement Trusts [1952] 1 All E.R. 1067; [1952] 1 T.L.R. 978. In this case trusts were created for the purpose of promoting international understanding and the freedom of the press, kept within the perpetuity period, with gifts over to persons holding certain offices. Roxburgh J. was only concerned with the fate of the income of these purpose trusts and he held that the trusts of income were unenforceable and uncertain and could not be administered by the court. "Institutions" are not a separate form of trust in English law as they are in some foreign systems. Only charities and private beneficiaries can enforce trusts.

The learned judge subjected to careful review the anomalous "animal" cases and was able to distinguish them and to point out their limited application. They were cases in which "the courts have found means of escape" from the general rule (at p. 1074).

The decision casts a shadow of uncertainty over various schemes to preserve the cultural, as distinct from the commercial, integrity of newspapers, but is clearly justified by previous decisions, such as those concerned with racial understanding. The entire subject deserves careful reconsideration at higher levels.

It will be noted that the life of King George V was used as the life-in-being identifier in this 1945 settlement, for perpetuity purposes.

(Theobald 92.)

Objects partly educational and partly self-interested.—Royal College of Surgeons in England v. *National Provincial Bank, Ltd.* [1952] 1 All E.R. 984; [1952] 1 T.L.R. 978 (H.L.). Residue was given to the Middlesex Hospital for their Institute of Pathology, with a gift over to the College of Surgeons if the Middlesex Hospital became nationalised. The Hospital was "nationalised" and the gift over took effect. No perpetuity rule applied since it was a gift over from one charity to another. It was held that the College of Surgeons was a charity because primarily founded for the advancement of medical science and the relief of suffering. The first object is educational and the second is a well-recognised form of charity, dating back to the relief of war veterans in the Statute of Elizabeth, though not generally clearly identified in the textbooks. Suffering is a matter above controversy, as is disease. It was argued that the College of Surgeons was not a charity because of its professional and disciplinary objects—what are broadly called the "trade union aspects" of a professional institution. The majority of their Lordships held, however, that these were secondary to its main charitable purposes, and the terms of the charter were adduced to prove this. A previous decision of the Court of Appeal in the opposite sense ([1899] 1 Q.B. 871) would have gone the other way if the College had laid more stress on its educational and examination functions.

There is an interesting complaint by Lord Morton (at p. 992) about the need to refer to such an old source as the Statute of 43 Eliz. c. 4, possibly designed to stimulate legislative action on the whole subject.

(Theobald 272.)

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3. *WILLS*

By A. Kiralfy, Barrister-at-Law

Successive wills—later will missing—earlier will unrevoked.—Re Wyatt [1952] 1 All E.R. 1030. The testator made a will in 1935 and a codicil in 1937. Later in 1937 he made a new will, but he removed this later will from the bank in May, 1939, and it was never seen again, so that it was presumed to have been destroyed *animo revocandi*. There was no evidence as to the contents of the later will nor whether it had contained a revocation clause. It was held that the original will and codicil were admissible to probate, there being no sufficient proof that it had ever been revoked. *Cutto* v. *Gilbert* (1854) 9 Moo.P.C. was applied.

(Theobald 42.)

Will—construction—survivorship—rule in Elliott v. *Joicey* [1935] A.C. 209.—*Re Hodgson* [1952] 1 All E.R. 769. The testator died in 1920. He left his residue on trust, after life interests, to such children of Captain Hodgson as should "survive" the testator, with a final gift over to such children of Archibald as should "survive" the testator. Archibald had children before 1920 but Captain Hodgson did not marry until 1923. It was held by Roxburgh J. that no children of Captain Hodgson could take under the will. The old decision in *Re Clark's Estate* (1864) 3 De G.J. & Sm. 111, is no longer applicable today except in special circumstances, in view of the decision of the House of Lords that a person, to "survive" another, must have been alive contemporaneously with that person.

(Theobald 227.)

Will—discretion of trustees—anticipation of nationalisation.—Dundee General Hospital Board of Management v. *Walker* [1952] 1 All E.R. 896. This was a Scottish appeal to the House of Lords. Trustees had been given discretion by a will to withhold a legacy left to the Dundee Royal Infirmary if the trustees were satisfied it had been put under State control. The testator died on April 16, 1947. The Scottish National Health Service Act became law on May 21, 1947, but operated retrospectively to March 21, 1946, as to

property held on trust for hospitals. It was held that the trustees were entitled to withhold the legacy since they had reasonable grounds to believe that otherwise the State would take the legacy. It appears that even an honest but unreasonable decision of the trustees would be effective.

(Theobald 328.)

Re Gape, Re Newland and *Re Wilson,* referred to in the previous issue are now reported in [1952] 1 All E.R. 827, 841 and 852, respectively.

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4. *PLANNING CASES*

By T. A. BLANCO WHITE, Barrister-at-Law

Development charge—transitional provisions—unfinished buildings.—The decision in *Marks & Spencer, Ltd.* v. *L. C. C.,* noted *ante,* p. 69, has been reversed by the Court of Appeal: see *sub nom. Re 42 Paddington Street, etc.* [1952] 1 All E.R. 1150. The court held (by a majority of two to one, Evershed M.R. dissenting) that the phrase "works for the erection of a building" in section 78 of the Town and Country Planning Act, 1947, includes the clearance of the site for a building by demolition of the buildings that were there before; with the result that where a site was so cleared before July, 1948, the actual erection of a building upon it after that date may escape development charge under the section.

Planning control—definition of "building"—buildings erected before 1933.—The decision in *Buckinghamshire County Council* v. *Callingham,* noted at 15 Conveyancer 441, has on the other hand, been upheld by the Court of Appeal: [1952] 1 All E.R. 1166; thus confirming, first, that model buildings are buildings in spite of their small size; and secondly, that planning control under the present Act could reach back even to buildings erected before 1933, if they were erected without permission in an area then subject to planning control.

Compulsory purchase—property subject to contract of sale.—*Hillingdon Estates Co.* v. *Stonefield Estates, Ltd.* [1952] 1 T.L.R. 1099; [1952] 1 All E.R. 853, decides that where land is subject to a contract for sale, and between the date fixed for completion and actual completion a public authority makes a compulsory purchase order covering that land and serves notice to treat, the purchaser under the contract must pay the contract price and recover what he can from the public authority concerned. The purchaser in this case

argued that the contract had been frustrated by the notice to treat; but Vaisey J. thought otherwise.

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5. *LANDLORD AND TENANT CASES*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

Licensee—tenant at will—exclusive possession not incompatible with licence—Limitation Act, 1939.—The line of authority which has swept away the old notion that exclusive possession is the mark of a tenancy in contrast with a licence has been strengthened by another decision, *Cobb* v. *Lane* [1952] 1 All E.R. 1199. This development is one which it is difficult for conservatively minded lawyers to accept, but the cases of *Errington* v. *Errington* [1952] 1 All E.R. 149; *Foster* v. *Robinson* [1951] 1 K.B. 149; *Marcroft Wagons, Ltd.* v. *Smith* [1951] 2 K.B. 496, and now *Cobb* v. *Lane* have built up a formidable body of doctrine. In *Cobb* v. *Lane* the occupation had continued for 13 years and there was exclusive possession. Nevertheless it was held that the occupant was a licensee, who had gone into possession in pursuance of a family arrangement, and not a tenant at will. If he had been a tenant at will he would have acquired a title under the Limitation Act, 1939, since he would have been in possession for more than 13 years from the commencement of the tenancy at will (sections 9 and 16 of the Act).

(Woodfall, 24th ed., p. 6.)

Limitation Act, 1939—*adverse possession—effect of Rent Restrictions Acts on character of tenant's possession—extinguishment of landlord's title.*—A period of adverse possession by a tenant within the meaning of section 10 of the Limitation Act, 1939, which has begun to run before the dwelling-house has become subject to the Rent Restrictions Acts does not cease to run when the dwelling-house becomes controlled by these Acts. The concept of "adverse possession" does not postulate in the party against whom it is adverse an unqualified right to recover possession. Therefore the fact that the right to obtain possession of a controlled house is hedged about with restrictions does not prevent the occupation of a tenant who has been paying no rent and making no other acknowledgment of the landlord's title from being adverse possession. This was so held by the Court of Appeal in *Moses* v. *Lovegrove* [1952] 1 All E.R. 1279. The court left open the question what would be the legal position if at the time the statutory period of limitation was alleged to *begin* to run the house was already subject to the control of the Rent Restrictions Acts, but the Master of the Rolls was careful to say that he did not mean to indicate that in these circumstances the possession could not begin to be adverse. A subsidiary point decided by the case was that a

rent book did not constitute a "lease in writing" within the meaning of section 9 (3) of the Limitation Act, 1939.

(Woodfall, 24th ed., p. 274.)

Landlord and Tenant Act, 1927—*claim for new lease by sub-tenants—expiry of head lease by effluxion of time—notice given to sub-tenants to quit inoperative.*—In *Allied Ironfounders, Ltd.* v. *John Smedley, Ltd.* [1952] 1 All E.R. 1344, the facts of which were somewhat unusual, the substantial point was whether a sub-tenancy was terminated by notice. If it was, the sub-tenants could put forward a claim, by virtue of section 5 (1), (2) and (11) of the Landlord and Tenant Act, 1927, for a new lease. The sub-tenancy, which was carved out of a head tenancy for a fixed term expiring on March 25, 1952, was terminable by six months' notice to expire on a quarter day. On March 24, 1952, the day before the head lease expired the head tenants gave the sub-tenants notice to quit purporting to expire on September 29, 1952. Devlin J. held that the sub-tenancy came to an end by operation of law when the head lease expired, and that it was not "terminated by notice" within section 5 (1), as incorporating section 4 (1), or within section 5 (2). Consequently, the sub-tenants' notice claiming a new lease, although served within a month of the notice to quit, was not served within the statutory time, and was a nullity.

(Woodfall, 24th ed., p. 1078.)

Landlord and Tenant Act, 1927—*Rent Restrictions Acts—alteration of premises—whether an improvement—breach of covenant—action for possession — proceedings in High Court — costs.* — In *Tideway Investment and Property Holdings, Ltd.* v. *Wellwood* [1952] 1 All E.R. 1142, tenants of flats within the Rent Restrictions Acts installed gas water heaters in their flats without the landlords' permission. The landlords were under no contractual obligation to provide hot water or other services but had in fact done so until certain tenants made successful applications to the Rent Tribunal for a reduction of rent. Thereafter the landlords discontinued the services, and there were inconclusive negotiations with the tenants. The flue pipes of the gas heaters installed by the tenants without consent had to be fastened to part of the balcony running along outside the flats, the balcony remaining the landlords' property. The tenancy agreements, which expired on December 25, 1950, contained a covenant not to make any alteration or to erect any stove or pipe without the landlords' written consent. In actions by the landlords for possession brought in the High Court, Harman J. decided the following points:—

(1) The installation of the gas water heaters constituted an "alteration" and was thus a breach of covenant. It could not be regarded as an "improvement," so as to attract section 19 (2) of the Landlord and Tenant Act, 1927, since it trespassed to some extent on the landlords' property (the balcony).

(2) Even if, contrary to the judge's view, it was an improvement, the landlords had not unreasonably withheld their consent.

(3) The tenants had, therefore, before the expiry of their tenancies committed a breach of covenant which could have been the subject of forfeiture proceedings if the notice required by section 146 (1) of the Law of Property Act, 1925, had been served.

(4) Since proceedings for forfeiture had not been taken before the expiry of the tenancies, there was nothing in law to prevent statutory tenancies from arising when the contractual tenancies expired, and statutory tenancies did in fact arise. Harman J. referred in passing to the view expressed by Asquith L.J. in *Court* v. *Robinson* [1951] 2 K.B. 60, at p. 73, that even if proceedings for forfeiture had been begun before the contractual tenancy expired, this would not prevent a statutory tenancy from springing into existence.

(5) As the tenants were statutory tenants, the question was whether it was reasonable to make an order for possession. Harman J. held that it was not, but he made the tenants' liberty to remain in possession subject to certain undertakings, including an agreement to pay a proper sum towards the landlords expenses within the meaning of section 19 (2) of the 1927 Act, and to deposit a proper sum for the reinstatement of the flat after removing the heater.

(6) As the actions were in the nature of claims for possession against statutory tenants for the breach of a term imported into the contractual tenancy by section 15 (1) of the 1920 Act, the court was precluded by section 17 (2) of the 1920 Act, as interpreted in *Russoff* v. *Lipovitch* [1925] 1 K.B. 628, and *Lee* v. *K. Carter, Ltd.* [1949] 1 K.B. 85, from awarding costs to the landlords. No order for costs was accordingly made.

(Woodfall, 24th ed., p. 610.)

Agricultural holdings—landlord's claim for damages for breach of covenant—jurisdiction of court—whether claim compulsorily referred to arbitration.—The judgments of the Court of Appeal in *Gulliver* v. *Catt* [1952] 1 All E.R. 929; 1 T.L.R. 956, are most important for those interested in the law of agricultural holdings. The most interesting part of the judgments was that which was not strictly necessary for the decision. The case could have been disposed of simply under section 99 of the Agricultural Holdings Act, 1948, as the notice to quit was served before March 1, 1948, and therefore the provisions of the 1948 Act as to compensation did not apply. This meant that the governing enactments were sections 10 and 16 of the 1923 Act, not sections 57 and 70 of the 1948 Act. The court, however, expressed their views on the interpretation of section 57 (3) of the 1948 Act, on the assumption that the 1948 Act applied, and this is the really intriguing part of the decision. The question here is whether a landlord can bring an action in the courts during the currency of an agricultural tenancy for breach of a covenant to repair,

or whether the joint effect of section 57 (3) (a) and section 70 (1) (b) is to prevent the landlord from asserting such a claim except by arbitration at the end of the tenancy. The Court of Appeal have expressed the view, which is contrary to that which a number of commentators on the Act have taken, that section 57 (3) does not deprive the landlord of a right to sue for damages under the agreement during the tenancy, even in respect of matters covered by section 57 (1). Section 57 (3) merely gives the landlord an option to frame his claim under that subsection, and *if* he does so he will be subject to the restrictions contained in the subsection.

The permissive wording of section 57 (3) lends support to this view, but it is not free from difficulties. The option which, on this view, is conferred by section 57 (3) is a somewhat curious one. It is an option to do in a restricted manner something which the landlord can already do in an unrestricted manner, namely, to make a claim under the covenants of the tenancy. What is the point of it? It may be said, with respect, that the judgments of the members of the Court of Appeal are not so helpful on this aspect of the case as they might have been.

(Jackson's Agricultural Holdings, 10th ed., p. 178.)

Agricultural holdings—death of tenant—service of notice to quit —notice not served on right person—nevertheless valid.—Wilbraham v. *Colclough* [1952] 1 All E.R. 979, is another helpful decision on the effect of serving a notice to quit, following the death of a person in occupation of a farm, upon persons who are not strictly the correct objects of the notice. This decision, together with *Egerton* v. *Rutter* [1951] 1 K.B. 472, and *Harrowby* v. *Snelson* [1951] 1 All E.R. 140, reduces the danger of going astray in this matter on a technicality. Since one of the few opportunities left to a landlord of an agricultural holding of recovering possession is by serving a notice to quit under section 24 (2) (g) of the 1948 Act within three months of the death of a tenant, it is important that the validity of the notice should not be endangered by undue strictness. It may be difficult to ascertain whether the deceased tenant died testate or intestate, and, if testate, who are his executors. It is now clear that service on the persons in possession will in most cases be effective, since they will be considered agents for the true tenant in carrying on the farming (section 92 (3)), and the fact that the notice is addressed, say, to "the executors" will not invalidate it, even if, as in *Egerton* v. *Rutter*, the tenant died intestate and the tenancy vested in the President of the Probate, Divorce and Admiralty Division. In *Wilbraham* v. *Colclough* the deceased, X, turned out not to have been the tenant, but merely one of the executors of a tenant, Y, who had died many years before. Nevertheless, a notice to quit served on X's executors was held valid, on the ground that they could be regarded as the agents of the real tenant, who was the surviving executor of Y. The decision did not actually turn on section 24 (2) (g) of the 1948 Act, but it should be kept in mind in relation to that paragraph.

Service tenancy or licence to occupy—effect of agreement taken as a whole—express provision negativing tenancy not conclusive.—*Facchini* v. *Bryson* [1952] 1 T.L.R. 1386, is of interest as the recurring question whether an agreement constitutes a service tenancy or merely a licence to occupy—a point which the long-continued operation of the Rent Restrictions Acts often renders most important. It is clear from this decision that it is the legal effect of the document as a whole which must be looked at. An express provision stating that " nothing in this agreement shall be construed to create a tenancy " is not conclusive. In this particular case the tenor of the document as a whole indicated a tenancy. It contained provisions as to repair, and right of entry and a prohibition of assigning, underletting or parting with possession. The facts of this case were rather similar to those of the unreported case of *The Three D's Co., Ltd.* v. *Barrow*, and it was held, as in that case, that a tenancy had been created.

Furnished Houses (Rent Control) Act, 1946, *and Landlord and Tenant (Rent Control) Act*, 1949—*security of tenure—notice to quit given more than three months after tribunal's decision—jurisdiction to give further security.*—In expressing a preference for the dissenting judgment of Jenkins L.J. in *R.* v. *St. Helens and Area Rent Tribunal, ex p. Pickavance* [1952] W.N. 279, the present commentator must declare an interest, inasmuch as he has since 1949 held the view now supported by this weighty minority opinion. It remains to be seen what view the House of Lords will take. The decision of the Queen's Bench Divisional Court (recorded in these Notes for March–April, 1952, at pp. 140–1) has been upheld by the majority of the Court of Appeal (Somervell and Morris L.JJ.). The point briefly is whether section 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949, is to be construed restrictively, by reference to section 5 of the Furnished Houses (Rent Control) Act, 1946, or given what appears to be its natural meaning. The majority of the Court of Appeal have decided in favour of the restricted interpretation, and have thus held that a tribunal had no power under section 11 (1) to give security of tenure where a notice to quit had been served one day after the three months' period of security given by section 5 had expired. In their view, before section 11 (1) can take effect, the conditions required by section 5 must be shown to be present. It is difficult to see how this view gives proper effect to the words " by virtue of the contract " in section 11 (1).

(Rent Restrictions Guide, 3rd ed., pp. 98–9.)

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6. *REVENUE CASES*

By Desmond Miller, of the Inner Temple, Barrister-at-Law

Note:—Where a case is not reported in any of the general series of law reports it is cited from the Annotated Tax Cases (A.T.C.) or Taxation Reports (T.R.).

(a) Income Tax

Keiner v. *Keiner* [1952] 1 All E.R. 643; [1952] T.R. 119 (Q.B.D.).

(1) *Statutory provisions*: Rules 19 and 21, the General Rules, the Income Tax Act, 1918.

(2) *Point*: Where the proper law of a contract is foreign law reliance cannot be placed on Rules 19 or 21, *supra*, to authorise any deduction by way of U.K. Income Tax.

(3) *Facts and Decision*: By deed executed in 1939 in the State of New Jersey, in the U.S.A., the husband (plaintiff) undertook to make certain yearly payments to the wife (defendant); the deed provided that the payments should be made in dollars and imported American law for the purpose of determining in what securities a certain fund should be invested. At the date of execution the husband was ordinarily resident in the U.K. and the wife in the U.S.A. The payments fell into arrear and the wife commenced proceedings for the arrears in the High Court of Justice in England; in her action an order by consent for payment of £6,000 in respect of the arrears was made.

The husband paid £2,000 in full but on tendering the balance claimed, by virtue of Rule 19 or 21, *supra*, to deduct income tax at the standard rate on the whole sum of £6,000.

The wife maintained that there was no right to deduct and accordingly the husband commenced proceedings in the High Court of Justice claiming a declaration that he was entitled to make these deductions.

Held:—that the proper law of contract was the law of the State of New Jersey and in consequence the husband could not make deductions authorised by the laws of the U.K. *Indian & General Investment Trust, Ltd.* v. *Borax Consolidated, Ltd.* [1920] 1 K.B. 539 applied.

(*Note*:—The question whether the debt was, as the result of the judgment, merged into a different obligation so as to prevent the deduction of tax, in any event, was expressly left at large.)

McIntosh v. *Manchester Corporation* [1952] 1 All E.R. 763; [1952] T.R. 131 (Ch.D.).

(1) *Statutory provisions*: Section 14, the Income Tax Act, 1945 (now section 278, the Income Tax Act, 1952).

(2) *Point*: The words "preparing," "cutting," "tunnelling" and "levelling" in subsection (1) of section 14, *supra*, are all descriptive of processes applied to land and do not describe the results or consequences of operating those processes.

C. I. R. v. *Gordon* [1952] 1 All E.R. 866; [1952] T.R. 149 (H.L.).

(1) *Statutory provisions*: Rule 2 of Case V of Schedule D, the Income Tax Act, 1918.

(2) *Point*: An agreement for a loan to be made in the United Kingdom with provision that the loan should be repaid by transference to and settlement in Ceylon, through the medium of banks, does not amount to a remittance payable in the U.K., nor to money or value received in the U.K. on credit or on account of such a remittance, within Rule 2 of Case V.

(3) *Facts and Decision*: The respondent was at all material times partner in a firm carrying on business in Ceylon. He had a bank account with the Colombo branch of the National Bank of India, which had its head office in London. The respondent was visiting this country at the time of the outbreak of war and owing to war conditions was unable to return to Ceylon and in the event was treated as ordinarily resident in the U.K. throughout the material period.

In 1942 the respondent opened an account with the head office of the National Bank of India, in London, and in the course of the same year in accordance with a verbal arrangement made by him in London was permitted, without giving security, to overdraw his account with the head office, the head office arranging to transfer portions of the overdraft to the Colombo branch bank. That branch then debited the respondent's account with the equivalent in rupees of the transfers and the respondent arranged to pay rupees into the branch account to meet such debit. Originally no arrangement was made as to when the transfers of overdraft should be made, but in September, 1942, correspondence was exchanged between the head office and the respondent the effect of which was to provide that whenever the figure overdrawn reached £500, the overdraft should be transferred to Colombo. Excerpts of the account in Colombo and London recorded various transfers from London to Colombo in pursuance of the verbal arrangements referred to, and it was agreed by the parties that these transfers represented "transfers of the overdraft." On some occasions the Colombo account was in credit and the balance of the credit was sufficient to wipe out the overdraft transferred, in other instances the differences were met by payment in of rupees to the Colombo account from the respondent's interest in his firm.

The Special Commissioners decided that they were unable to distinguish the facts from those in *Hall* v. *Marians,* 19 T.C. 582, and that no sums had been remitted to the respondent in this country.

Held (affirming the decision of the Court of Session), that the income receipts of the respondent were income receipts in Ceylon and that the moneys received in London were advances of capital. It followed that there were no remissions, chargeable within Case V. *Hall* v. *Marians, supra,* approved. *Trinidad Lake Asphalt Operating Co., Ltd.* v. *Trinidad and Tobago Income Tax Commissioners* [1945] A.C. 1, considered.

Crompton v. *Reynold and Gibson* [1952] 1 All E.R. 888; [1952] T.R. 169 (H.L.).

(1) *Statutory provisions*: Case I of Schedule D, the Income Tax Act, 1918.

(2) *Point*: Where a succession to a trade occurs and the successor,

as part of the assets taken over acquires book debts of his predecessor at a written down value and subsequently collects the debts in full, the surplus so arising can only be charged to tax as a trading receipt in the hands of the successor if the Commissioners find, upon the facts, that the scope of the trade as carried on is wide enough to include the acquisition, holding, and collection of the debt. *Harry Hall, Ltd.* v. *Barron,* 30 T.C. 451, overruled.

Townsend v. *Electrical Yarns, Ltd.* [1952] 1 All E.R. 918; [1952] T.R. 109 (Ch.D.).

(1) *Statutory Provisions*: Section 55 (3), the Income Tax Act, 1945 (now section 323 (4), the Income Tax Act, 1952).

(2) *Point*: Section 55 (3), *supra,* requires that a separate assessment should be made for the relevant year in respect of the amount upon which the balancing charge is to be made, as opposed to requiring a variation in the amount of the assessment made on the trading profit of that year.

Re Batley (deceased) [1952] 1 All E.R. 1036; [1952] T.R. 197 (Ch.D.).

(1) *Statutory Provisions*: Sections 354 and 355, the Income Tax Act, 1952.

(2) *Point*: Where an annuitant wife is bound to account for income tax reliefs in accordance with the rule in *Re Pettit* [1922] 2 Ch. 765, her duty as trustee of this statutory right (to recover tax overpaid) extends, if that be necessary, to a demand for assessment separate from her husband in accordance with section 355 of the Income Tax Act, 1952. *Re Kingcome* [1936] Ch. 566, considered and applied.

Newsom v. *Robertson* [1952] 1 All E.R. 1290 (Ch.D.).

(1) *Statutory Provisions*: Rule 3 (a) of the Rules applicable to Cases I and II of Schedule D, the Income Tax Act, 1918.

(2) *Point*: Where the taxpayer carries on his professional activities, in part, at his home, the expense of travel incurred in making the journey between home and place of business is expended upon a dual purpose, that is to say in his capacity as a husband and father travelling to his home and as a professional man exercising his vocation. In these circumstances it cannot be said that the expense of travel is wholly and exclusively made for the purpose of the profession within rule 3 (a).

(3) *Facts and Decision*: The appellant taxpayer, a barrister practising at the Chancery Bar had chambers in Lincoln's Inn. His home was in the country near Whipsnade and evidence was given before the Commissioners that he used a study for the purposes of his professional work which he took home in the evenings and at the week end; in addition, during vacations, the appellant, who seldom

came to London, did the greater part of his work at home. The taxpayer claimed and obtained a "study allowance" and he now sought to deduct for income tax purposes the expense of travel between his home and his chambers in Lincoln's Inn. The Special Commissioners found that the expense of travelling between home and chambers during term time was not deductible under rule 3 (a) but that the expense of such travel during the vacation was admissible.

Held (reversing the Special Commissioners' determination on the second point):—

(i) that the position throughout the whole period of assessment must be viewed and when so viewed it was clear that the expenditure on travel had been incurred with a dual purpose and accordingly was not deductible as being wholly and exclusively incurred for the purposes of the profession.

(ii) The difficulty of splitting the expense between the amount referable to professional purposes and the amount referable to other purposes precluded apportionment.

Harvey v. *Caulcott* [1952] T.R. 101 (Ch.D.).

(1) *Statutory provisions*: Case I of Schedule D, the Income Tax Act, 1918.

(2) *Point*: A builder can have a private investment in land just as, for example, a stockbroker can have a private investment in shares. There is, however, a heavy burden of proof upon the builder in such a case but it is not incapable of discharge and was discharged where there was evidence of intention, from the outset, to retain the particular buildings as an investment, coupled with a lengthy period of retention; and no other action which caused the properties in question necessarily to be regarded as trading stock.

Phillips v. *Whieldon Sanitary Potteries, Ltd.* [1952] T.R. 113 (Ch.D.).

(1) *Statutory provisions*: Rule 3 (d) of the Rules applicable to Cases I and II of Schedule D, the Income Tax Act, 1918.

(2) *Point*: It is conceded that expenditure upon replacement as opposed to repair cannot be deducted as a revenue disbursement and in deciding whether there has been something more than a mere repair regard must be had to the size and importance of the article upon which the expenditure has been made in relation to the working component, for example the factory, of which it forms part.

The authorities reviewed.

Wood v. *Black's Executors* (*Public Trustee*) [1952] T.R. 123 (Ch.D.).

(1) *Statutory provisions*: Case I of Schedule D, the Income Tax Act, 1918.

(2) *Point*: Whether executors are or are not carrying on a trade is a question of fact but if they are so trading it does not follow that the profits earned in such manner are not taxable merely because it is necessary for them to carry on the business for the purpose of beneficially winding it up.

(b) Surtax

Conway v. *Wingate* [1952] 1 All E.R. 782; [1952] T.R. 145 (C.A.).

(1) *Statutory provisions*: Section 66 (1), the Finance (1909–10) Act, 1910; section 38, the Finance Act, 1937.

(2) *Point*: The words income tax prima facie include surtax but this presumption can be displaced by indications to the contrary contained in the material document.

(3) *Facts and Decision*: The plaintiff and defendant were in partnership for some years; in 1949 there were differences of opinion and an agreement was entered into between the plaintiff and the two other partners for the assignment of the plaintiff's share of the partnership business to one of the defendants.

By clause 4 of the agreement the defendants' gave the following joint and several indemnity:—

> "The purchaser and Mrs. Wingate (the first and second defendants) hereby further jointly and severally covenant with the vendor (the plaintiff) to pay and discharge all the debts and liabilities of the said partnership business existing or accruing at the date of these presents and all liabilities (including that of the vendor personally) for income tax excess profits tax and property tax of and relating to the said partnership down to the date of these presents and shall in respect of all such matters keep the vendor indemnified from all actions proceedings claims demands and liability in respect thereof."

The plaintiff brought the present proceeding claiming a declaration that the continuing partners were thereby obliged to discharge his liability to surtax in respect of his share of the partnership profits up to the date of the agreement.

Held:—that while surtax was rightly described as an additional income tax it was not income tax "of and relating to the partnership" since it was a liability of the individual partner and not of the firm, and accordingly the defendants were not liable to the plaintiff in manner claimed. *Re Reckitt* [1932] 2 Ch. 144, considered and distinguished.

Stewart's Executors v. *C. I. R.* [1952] T.R. 185 (Ch.D.).

(1) *Statutory provisions*: Sections 2 and 5, the Apportionment Act, 1870; sections 31, 32 and 35, the Finance Act, 1938.

(2) *Facts and Decision*: The deceased was residuary legatee under his wife's will; his wife had herself been entitled to a life interest in income in half of her first husband, Mr. Walker's estate. After the wife's death dividends in respect of the investments forming

part of the Walker estate were declared and paid and of these the sum of £4,659 was paid by the Walker trustees to the executors of wife as being the apportioned part of the income deemed by virtue of the provisions of the Apportionment Act, 1870, to have accrued during the lifetime of the wife.

In the result therefore the sum of £4,659 passed to the executors of the wife's will and then to the husband as residuary legatee. As a consequence the Revenue claimed that this payment was to be treated as part of the income of the wife's estate upon which the husband was taxable pursuant to the provisions of sections 31, 32 and 35 of the Finance Act, 1938.

Held:—the Inland Revenue's contention was correct. *Wood* v. *Owen* [1941] 1 K.B. 22, followed; *Gospel* v. *Purchase* [1951] 2 All E.R. 1071, distinguished.

(c) Profits Tax

Union Corporation, Ltd. v. *C. I. R.*; *Johannesburg Consolidated Investment Co., Ltd.* v. *C. I. R.*; *Trinidad Leaseholds, Ltd.* v. *C. I. R.* [1952] 1 All E.R. 646; [1952] T.R. 69 (C.A.).

(1) *Statutory provisions*: Section 39 (1), the Finance Act, 1947.

(2) *Point*: The non-distribution relief granted by section 39 (1) applies only to a company ordinarily resident abroad and not ordinarily resident also within the United Kingdom.

(3) *Facts and Decision*: The three companies were at all material times ordinarily resident in the United Kingdom and they claimed the relief from a distribution charge accorded by section 39 (1). *supra*, to persons ordinarily resident outside the United Kingdom on the grounds that they had a dual residence, being concurrently resident in a place or places outside the United Kingdom.

The Special Commissioners decided that the relief was available in cases where concurrent residence was shown but on the facts held that at the material time the companies were ordinarily resident only in the United Kingdom.

On appeal Harman J. dismissed the companies' appeals holding, upon the construction of section 39, that it did not apply to a company ordinarily resident in a place outside the United Kingdom throughout the chargeable accounting period if it were also ordinarily resident in the United Kingdom during the like period; it was therefore unnecessary for him to decide the question of residence.

Held (affirming the judgment of Harman J.), that subsection (1) of section 39, *supra*, applied only to a company which at the material time was ordinarily resident abroad and was not at the same time ordinarily resident within the United Kingdom.

Obiter, the court on a review of the authorities bearing on the question of residence of bodies corporate adopted with approval the statement of Sir Owen Dixon J. in the Australian case of *Koitaki Para Rubber Estates, Ltd.* v. *Federal Commissioner of Taxation* (1940) 64 Commonwealth L.R. 15, 241:—

> "The better opinion, however, appears to be that a finding that a company is a resident of more than one country ought not to be

made unless the control of the general affairs of the company is not centred in one country but is divided or distributed among two or more countries. The matter must always be one of degree and residence may be constituted by a combination of various factors, but one factor to be looked for is the existence in the place claimed as a residence of some part of the superior or directing authority by means of which the affairs of the company are controlled."

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7. *MISCELLANEOUS CASES*

Divorce—secured maintenance—general charge.—In *Barker* v. *Barker* [1952] 1 All E.R. 1128 on the dissolution of the marriage of the parties, the registrar had ordered the husband to secure to the wife the annual sum of £300 and to pay her maintenance at the rate of £400 per annum. By a subsequent order it was directed that the annual sum of £300 should be secured by a general charge on all of the husband's assets. The Court of Appeal expressed its disapproval of ordering security by means of a general charge, holding that it " would be at once oppressive in effect, uncertain in operation, difficult of enforcement, and of doubtful validity." It was further held that the Matrimonial Causes Act, 1950, s. 19 (2), cannot be construed as sufficiently wide to include an order for security in the form of a covenant by the husband to pay a specified annual sum during the wife's life with or without a charge of the annual sum in question of specified assets of his. It had been consistently held prior to the 1950 Act that secured provision could not impose a personal obligation on the husband, and orders for secured provision must not be made *in terrorem* in order to bring pressure to bear on the husband (and on other persons) to contrive to make provision for a wife which they could not otherwise be required to do.

Wife's right to occupy the matrimonial home.—The legal position of the wife in the matrimonial home has made steady progress over the last few years. After a slight setback in *Thompson* v. *Earthy* [1951] 2 K.B. 596 (noted in Vol. 15, p. 271) she regained her ground in *Errington* v. *Errington* [1952] 1 All E.R. 149 (noted *ante*, pp. 54 and 71), and has now consolidated her position in *Lee* v. *Lee* [1952] 1 All E.R. 1299 and *Bendall* v. *McWhirter* [1952] 1 All E.R. 1309. In the former of these two cases a wife had been deserted by the husband and left in occupation of the matrimonial home. The husband charged the property in favour of his bank and the wife, fearful of losing her home, applied to the county court under section 17 of the Married Women's Property Act, 1882, for an order permitting her to reside in the home until the husband provided suitable alternative accommodation, and restraining him in the meantime from dealing with the property in any way so as to interfere with her right to residence.

The order was granted and the Court of Appeal dismissed the husband's appeal from it. During the course of his judgment Denning L.J. said (at p. 1301): "The order confirms and protects her special right as a deserted wife to stay there—a right which has been repeatedly recognised in this court. It seems to me that, if a purchaser should buy with notice of that right, or, at any rate, with notice of the order, he could not, in disregard of it, eject the wife: see *Errington* v. *Errington* (*supra*)."

The point in *Bendall* v. *McWhirter* was whether the wife's right to remain in possession of the matrimonial home, where she had been deserted by her husband, bound his trustee in bankruptcy, and the Court of Appeal held it did. Her position is that of a licensee under an irrevocable licence which the husband is presumed in law to have conferred on her. The licence is determined by the death of the husband, divorce or an order of the court. The proper course for the trustee in bankruptcy to take is, not ejectment proceedings, but either to apply under section 105 (1) of the Bankruptcy Act, 1914, or, possibly, in the name of the husband, under section 17 of the Married Women's Property Act, 1882, for an order that the wife should give up possession. Somervell and Romer L.JJ. were doubtful whether the latter course was open to the trustee.

Denning L.J. went in some detail into the question of the extent to which purchasers are bound by licences generally. He expressed the view that a purchaser with notice is bound. "When a contractual licence to put up advertisements on a wall has been acted upon by putting up advertisements, it is binding on the successors in title of the licensor, including his tenant: see *Re Webb* [1951] Ch. 808 (noted in Vol. 15, pp. 267, 283)." And possession is notice: "In some contractual licences over land (not amounting to occupation) there may be some nice questions whether the licence is an equitable easement which must be registered to be binding on successors: see an illuminating note on 'Equitable Easements' by Mr. Geoffrey Cross in The Bell Yard, No. 15, p. 18. But no such questions arise where the licensee is in possession or actual occupation of the land, because that itself is sufficient notice of his rights: see section 14 of the Law of Property Act, 1925, section 70 (1) (g) of the Land Registration Act, 1925, and *Lewisham Borough Council* v. *Maloney* [1948] 1 K.B. 50."

It is unfortunate that *Hollington Bros., Ltd.* v. *Rhodes* [1951] 2 All E.R. 578 (noted in Vol. 15, p. 355), *Coventry Permanent B. S.* v. *Jones* [1951] 2 T.L.R. 739 (noted in Vol. 15, p. 184), and *Sharp* v. *Coats* [1949] 1 K.B. 285, were not referred to, for, in the case of unregistered land, it has been consistently held that occupation is not an alternative to registration under the Land Charges Act, 1925.

If licences are binding upon purchasers with notice, solicitors must make careful inquiries on the point and, indeed, until the question has been fully considered by the Court of Appeal, should act upon the assumption that occupation is an alternative to registration, not merely in the case of licences, but also in the case of all other matters capable of registration under the Land Charges Act, 1925.

THE LIBRARY

Current Law Income Tax Acts Service (CLITAS). Editor-in-Chief: Miss H. G. S. Plunkett. Sweet & Maxwell; Stevens & Sons. 1,258 pp. (£3 10s.) (Service subscription £1 10s.)

The text of the Income Tax Act, 1952, comprising some 532 sections and 25 Schedules, forms the bulk of the present loose-leaf volume of CLITAS. The chief irritant to the practitioner who has learned where to look for his law is removed by the annotation to each section; the keynote giving the derivation from the Income Tax Act, 1918, and subsequent Finance Acts. In addition, the sectional annotation includes a useful scheme of cross-reference to inter-related provisions of the Act, to the paragraphs in Konstam's Law of Income Tax where a more detailed consideration of the section or point at issue is to be found, and a discussion of the relevant case law. Altogether an admirable piece of work upon which the Editor-in-Chief and her fellow contributors are to be congratulated.

The volume also contains a print of the Double Taxation Conventions, the Regulations and a table of statutory comparisons, of which the latter, particularly, will be of considerable assistance to the practitioner.

Quite apart from the foregoing CLITAS is to embody an extensive service (see the Publishers' Foreword at p. 10) of which one can say little at this stage except to refer to the "Referencer and Digest" of cases which seems excellent in conception.

I have no criticism to make of CLITAS, except for its size, and for this no one can be blamed but a legislature which seems to perceive some merit in consolidation, which I, for one, cannot.

For those not requiring the full service, the text of the Act, annotated, with a table of comparison and index, is available separately for thirty shillings.

D. M.

Conveyancing Precedents under the Property Statutes of 1925. With explanatory notes by Hubert A. Rose, M.A., Sometime Scholar of St. John's College, Cambridge, of the Inner Temple, and of Lincoln's Inn, Barrister-at-Law, and Michael Bowles, B.A., of Trinity College, Cambridge, of Gray's Inn, and of the Inner Temple, Barrister-at-Law. Fourth Edition. London: Waterlow & Sons, Ltd. lxxxviii and 598 pp. (£2.)

A new and up-to-date edition of this valuable work is very welcome. Most of us are well acquainted with the subject-matter and all precedents follow more or less the same plan. In this, a comparatively small volume, the difficulty was to know what to leave out, and this difficulty has been met by leases and the statutory will forms having been entirely omitted; thus valuable space is freed for new precedents, including, we note, a contributory mortgage and a compromise of a widow's claim under the Inheritance (Family Provision) Act, 1938. The notes to the various precedents are very clear and lucid.

The investment clause on page 365, "Unrestricted range," meets the difficulty caused by *Re Power* [1947] Ch. 572 that an unrestricted power will authorise an investment in the purchase of real estate, but not, unless suitable words are added, the purchase of a house as a home for a beneficiary. Mr. Rose has added in brackets to this form the words "(including the purchase of any property for the beneficial occupation or enjoyment of any beneficiary or beneficiaries who would be entitled to receive or to whom or whose benefit the trustees would have power to pay or apply the income of such property if producing income)," but in my opinion the words in brackets in the *Conveyancer*, vol. 13, p. 572 (iii), are more concise.

It is a pity and might lead to trouble that no reference is made to the usual clause that the restriction on the consolidation of mortgages imposed by section 93 of the Law of Property Act, 1925, shall not apply is omitted in the first three mortgage precedents, and that no reference is made to it until at the end of Precedent IV (p. 296) a reference is made to Precedent I, clause 5, and the draftsman is told to insert it—but why should not each form include a clause for the preservation of the right to consolidate? Some have it, most do not.

The Index of 90 pages is good and clear.

D. C.

Emmet's "Notes on Perusing Titles" (Second Supplement to Thirteenth Edition). By J. Gilchrist Smith, LL.M. Solicitors' Law Stationery Society, Ltd. (10s. 6d.)

Continuing the policy of bringing up to date this work by cumulative supplements, the second supplement carrying the law up to December 31, 1951, has now been issued, and will be welcome to those using this work. Although it is claimed only that the supplement contains changes in the law up to the end of 1951, a short note of the Report of the Committee on Local Land Charges, published on January 11, 1952, appears in the supplement. Within its 107 pages the practitioner will find notes of decisions bearing on conveyancing. This reviewer has not observed any notable omission.

The question of the effect of bequests to hospitals is still causing perplexity, and practitioners will find the note on pages 14 and 15 of the recent decisions useful for reference. Perhaps one of the most important Statutes noted in the supplement is the Reserve and Auxiliary Forces (Protection of Civil Interests) Act, 1951, which affords wide protection against legal remedies to members of the Reserve or Auxiliary Services, and National Servicemen. It may be described as a faint echo of the Courts (Emergency Powers) Act, 1943.

All the Statutes for 1951 affecting conveyancers are noted on pages 20 to 22.

E. O. W.

Jones' Solicitor's Clerk. Part I. Fourteenth edition. By F. W. Broadgate. London: Sir Isaac Pitman & Sons, Ltd. 374 pp. and Index. (15s.)

There must be many managing clerks who remember with affection Jones' Solicitor's Clerk, the last edition of which appeared in 1938. A surprising amount of practical information is compressed into a comparatively small space, particularly on the subjects of High Court and County Court practice and costs. It appears to us that the chapters on conveyancing are rather weaker than most of the others and have not been revised too thoroughly. Searches for judgments and executions in the Central Office are not made

(p. 58). No indication is given where or how many local searches are made (pp. 61–62). The description of the local registers is incomplete. The draft conveyance on p. 65 is rather out of date. We hope that when the next edition is prepared a determined effort will be made to see that the book's many excellencies are not marred by a number of blemishes that could without difficulty be removed.

F. F. G.

Konstam on the Law of Income Tax. Twelfth edition. By E. M. KONSTAM. Stevens & Sons; Sweet & Maxwell. lxxxv, 534 and [82] (index) pp. (£4 10s.)

The Consolidation Act is on the Statute Book as the Income Tax Act of 1952 and this of itself would necessitate a new edition of any standard work on taxation.

The new *Konstam* is therefore based upon the Act of 1952 and the learned author has taken advantage of the occasion to embody by reference and comment the authorities, of which there are something in the region of 100, from the judgments delivered since the date of the 11th edition.

As a standard work the layout of this book will be familiar to those whose tasks lie in the sphere of advising on matters of taxation; it will suffice, therefore, to say that this edition of *Konstam* sustains its predecessors' repute for a high standard of textual commentary coupled with a careful comparative analysis of the authorities. A useful and welcome addition is the inclusion, in the footnotes, of references to the official tax cases.

D. M.